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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1959

No. 597 25

HONORABLE JULIUS J. HOFFMAN, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, PETITIONER,

vs.

JOHN F. BLASKI, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 22, 1958
CERTIORARI GRANTED FEBRUARY 24, 1959



SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 7007

JOHN F. BLASKI, et al.

v.

R. P. HOWELL, JR., et al.

COMPLAINT

To Said Honorable Court:

Now comes John F. Blaski, a resident citizen of the State of Illinois; Peter S. Pedersen, a resident citizen of the State of Illinois; M-P-H Manufacturing Corporation, Inc., a corporation duly organized and existing under the laws of the State of Illinois and having its principal office and place of business in Chicago, Illinois; Peter S. Pedersen, Jr., Edward Martin, and Peter S. Pedersen, Co-Partners, doing business as Central Farm Equipment Company, each resident citizens of the State of Illinois, hereinafter respectively called Plaintiff or Plaintiffs, complaining of R. P. Howell, Jr., a resident citizen of Dallas, Dallas County, Texas, in the Northern District of Texas; and Lifetime Metal Building Co., a Texas corporation, having its principal office and place of business in Dallas County, Texas, where service of process can be had upon R. P. Howell, Jr., the president thereof, hereinafter called Defendant or Defendants, and for such complaint would respectfully show the Court as follows:

I.

That this Honorable Court has jurisdiction of this cause by virtue of United States Code, Title 28, Section 1338, in that this cause arises under an Act of Congress relating to patents as will be hereinafter more fully shown.

II.

That heretofore on February 24, 1948, the United States Patent Office duly and legally issued Patent No. 2,436,543 to [fol. 2] John F. Blaski, Plaintiff herein, entitled "Roof Construction", granting six claims comprising a structural metal panel and method of forming the same, all as is more fully set out and described in the said patent which is adopted and made a part of this complaint. That said patent was issued pursuant to an application by the said John F. Blaski, Plaintiff herein, filed July 11, 1945, Serial No. 604,424 and which patent was thereafter and now is held by the said John F. Blaski under and by virtue of the laws of the United States.

That heretofore on October 17, 1950, the United States Patent office duly and legally issued Patent No. 2,526,323, to John F. Blaski, Plaintiff herein, entitled "Roof Construction", granting eight claims comprising a structural metal panel and method of forming the same, all as is more fully set out and described in the said patent which is adopted and made a part of this complaint. That said patent was issued pursuant to an application by the said John F. Blaski, Plaintiff herein, filed October 18, 1946, Serial No. 704,082, and which patent was thereafter and now is held by the said John F. Blaski under and by virtue of the laws of the United States.

III.

That after the issuance of said patents as above described, John F. Blaski by lawful contract named Peter S. Pedersen as sole and exclusive licensee under said patents and each of them, for the purpose of manufacture and sale of the patented panel and the use and employment of the patented method, and the right to grant sub-licenses to others.

That thereafter by lawful contract Peter S. Pedersen named M-P-H Manufacturing Corporation, Inc. as sub-licensee for the manufacture and sale of the patented panels and for the use and employment of the patented method limited to sales thereof for civilian purposes.

[fol. 3] That thereafter by lawful contract Peter S. Pedersen named Peter S. Pedersen, Jr., Edward Martin and Peter

S. Pedersen, co-partners, doing business as Central Farm Equipment Company as sub-licensee for the manufacture and sale of such patented panels and for the use and employment of such patented method limited to sales thereof for governmental purposes.

That each and all of Plaintiffs named herein have actively and diligently employed the patented method, produced the patented panel, established sales organizations, developed advertising and publicity and have effected the substantial sale, use, and employment of such patented panels with the public throughout the United States, whereby substantial commercial success of the patented panel has been achieved. That each of the Plaintiffs has an identical interest in this cause to the extent of their respective interest in, to, and under said patents and each of them and are entitled to the protection of this Honorable Court as hereinafter prayed for.

IV.

That prior to and at the time of institution of this cause and within the Northern District of Texas the Defendants herein, R. P. Howell, Jr., and Lifetime Metal Building Co. acting together have infringed and are now infringing said patents by employing the method of said patents to produce and sell panels as disclosed and claimed in said patents.

V.

That the Plaintiffs herein employing the patented method and producing the patented panels have heretofore and are now advertising and selling same within the Northern District of Texas. That proper statutory notice of said patents have been applied to the panels so sold, and in said advertising prominent notice is given of the patented nature of the panel for the benefit of the public and these Defendants. [fol. 4] That Defendants herein were and are charged thereby with actual notice of such patents as well as their continuing infringement thereof.

VI.

Plaintiffs would respectfully show the court that the Defendants, heretofore employing the patented methods owned

by Plaintiffs and producing and selling panels covered by patents owned by Plaintiffs, have realized monies and profits which rightfully should have been realized by Plaintiffs all to Plaintiffs' damage measured by not less than a reasonable royalty together with interest as provided by law. Plaintiffs would further show the Court that Defendants are now employing and will continue to employ the method patented to Plaintiffs and to produce the panels patented to Plaintiffs in continuous infringement and damage of the rights secured to Plaintiffs by such patents for the prevention of all of which Plaintiffs here pray for injunction as provided by law.

VII.

That Plaintiffs in protection of their patents against the infringements by the Defendants, and to secure their damages have been suffered to employ legal counsel and to obligate themselves for a reasonable fee for the filing and prosecution of this suit and pray the Court to assess a reasonable sum against said Defendants for Plaintiffs attorneys fees as further damages.

Wherefore, Premises Considered, Plaintiffs pray that Defendants be cited in terms of law to appear and answer herein and upon final hearing Plaintiffs have judgment permanently enjoining the Defendants and each of them from further infringement of said patents as herein alleged; for damages for past infringement of said patents; for reasonable attorneys fees as damages; for all costs in this behalf [fol. 5] expended; and for such other and further relief to which Plaintiffs may be entitled in law or in equity.

Marzall, Johnston, Cook & Root, 135 South La Salle Street, Chicago, Illinois.

John O'C. Fitzgerald, 10 S. LaSalle Street, Chicago, Illinois.

Biggers, Baker, Lloyd & Carver, 2020 Republic Bank Building, Dallas, Texas, RI 2-7755.

[fol. 6]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Title omitted]

ANSWER

Defendants R. P. Howell, Jr. and Lifetime Metal Building Co. answering the Complaint herein, allege:

1. The defendants deny each and every allegation contained in paragraphs IV, VI and VII of the Complaint.

2. The defendants are without knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraphs III and V of the Complaint.

3. The defendants are without knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph II of the Complaint, except that the defendants deny that U. S. Letters Patents No. 2,436,543 and No. 2,526,323 were duly and legally issued.

[fol. 7] 4. The defendants are without knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in the preamble to the Complaint herein which relates to the several plaintiffs named therein.

Further answering, defendants allege:

5. Neither of the defendants has made, used, sold or practiced any of the alleged inventions purportedly described in the said U. S. Patents No. 2,436,543 and No. 2,526,323, nor have the defendants, or either of them, violated any rights under the said patents.

6. The said U. S. Patents No. 2,436,543 and No. 2,526,323, and each of them, are invalid and void because the said Blaski was not the original and first inventor of the alleged improvements described and claimed therein, but the same, in all of their material and substantial parts, were invented, known to and used by others in this country be-

fore the alleged invention thereof, were patented and described in printed publications in this and foreign countries before the alleged invention thereof, and more than one year prior to the date of the application for the said patent; and were in public use and on sale in the country for more than one year prior to the date of the application for the said patent, and the alleged invention was described in patents granted on applications for patents by others filed in the United States before the alleged invention thereof by the said Blaski.

[fol. 8] 7. The said U. S. Patents No. 2,436,543 and No. 2,526,323, and each of them, are invalid and void for each of the following reasons:

(a) Because the alleged inventions described and claimed therein did not constitute patentable matter within the meaning of the Patent Law.

(b) Because the differences, if any, between the alleged inventions and the prior art are such that the subject matter as a whole would have been obvious, at the time the alleged inventions were made, to a person having ordinary skill in the art to which said subject matter pertains.

(c) Because the alleged inventions purported to be patented thereby and the manner and process of making and using them are not described therein in such full, clear, concise, and exact terms as to enable any person skilled in the art to which they pertain, or with which they are most nearly connected, to make and use the same.

(d) Because the specifications thereof do not contain any claim particularly pointing out and distinctly claiming the subject matter which the patentee claims as his alleged invention.

(e) Because the alleged inventions attempted to be set forth therein are inoperative and devoid of utility.

(f) Because the alleged inventor abandoned the alleged inventions whereby the same became public property.

(g). Because the alleged inventor of the said patents did not duly comply in all respects with the provisions, conditions and requirements of the Patent Laws of the United States in such cases made and provided for the prosecution of the patent applications on which said patents were granted, and the prosecution of said applications before the Patent Office was unlawful and was not in compliance in all respects with the said Patent Laws and with the rules of the Patent Office.

[fol. 9] 8. By reason of the proceedings in the United States Patent Office during the prosecution of the applications which resulted in said Letters Patents No. 2,436,543 and No. 2,526,323, and the admissions and representations therein made by or in behalf of the applicant therein in order to induce the grant of patent upon said applications, the patentee and the plaintiffs are estopped to claim for said letters patents a construction, were the same otherwise possible, such as would cause said letters patents to cover or include any acts of defendants.

Wherefore, the defendants demand judgment dismissing the Complaint herein and awarding them reasonable attorney's fees, together with the costs and disbursements of this action and such other, further and different relief as may be just and proper.

Locke, Locke & Purnell, By /s/ Stanley E. Neely, Attorneys for Defendants, Republic National Bank Building, Dallas, Texas.

[fol. 10] CERTIFICATE OF SERVICE (omitted in printing).

[fol. 11]

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 7007

JOHN F. BLASKI, PETER S. PEDERSEN, M-P-H MANUFACTURING CORPORATION, INC.; PETER S. PEDERSEN, JR., EDWARD MARTIN, and PETER S. PEDERSEN, Co-Partners, doing business as Central Farm Equipment Company, Plaintiffs,

v.

R. P. HOWELL, JR. and LIFETIME METAL BUILDING COMPANY, Defendants.

ORDER OF TRANSFER—April 16, 1957

The defendants having moved for an order transferring the venue of this cause to the United States District Court for the Northern District of Illinois, Eastern Division, and said motion having duly come on to be heard on April 11, 1957, and the Court having heard the argument of counsel and being fully advised, and it appearing to the Court that defendants' motion should be granted for the convenience of parties and witnesses in the interest of justice, it is

Ordered, that this action be transferred from the United States District Court for the Northern District of Texas, Dallas Division, and it is further

Ordered, that the Clerk of this United States District Court for the Northern District of Texas, be and hereby is directed to transfer all records and papers in this action, [fol. 12] together with the deposit made by the plaintiffs, to the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, together with a certified copy of this order.

Dated April 16, 1957.

.....
United States District Judge

Approved as to Form:

.....
Of Biggers, Baker, Lloyd & Carver
Attorneys for Plaintiffs

.....
Of Locke, Locke & Purnell
Attorneys for Defendants

[fol. 13]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16686

EX PARTE JOHN F. BLASKI, et al.

Motion for Leave to File Petition for a Writ of Mandamus.

OPINION DENYING MOTION TO FILE PETITION FOR WRIT OF MANDAMUS—June 14, 1957

Before Rivers, Jones and Brown, Circuit Judges.

JONES, Circuit Judge:

The movants here, who were plaintiffs in the district court, have their residence in the Northern District of Illinois. They instituted suit in the district court for the Northern District of Texas against several defendants, all of whom reside in the Northern District of Texas. The complaint charged patent infringement. The defendants made a motion to transfer the cause, pursuant to 28 U.S.C.A. §1404(a), to the Northern District of Illinois. In their motion the defendants stated that their witnesses were much closer to the court in Illinois than to the court in

[fol. 14] Texas. They also stated, among other averments, that there is pending in the district court for the Northern District of Illinois a consolidated action in which the plaintiffs in the Texas suit were charging infringement of the same patent as was involved in the suit in Texas. It was shown that in the action in the Northern District of Illinois much pre-trial information and evidence had been developed which would be relevant in the case commenced in the Northern District of Texas. The defendants waived their right to be sued in the Northern District of Texas and consented to the consolidation of the action with the cause pending in Illinois. An order was entered transferring the cause to the Northern District of Illinois. The plaintiffs, by motion, unsuccessfully sought from the district court an order vacating the order of transfer. The plaintiffs, John P. Blaski and others, have filed in this court their motion for leave to file a petition for a writ of mandamus to require the district court to vacate and set aside the order of transfer. This motion we now consider.

The authority for ordering the transfer is the statutory enactment which provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C.A., §1404(a).

Congress has prescribed venue in patent infringement cases in this language:

> "Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts [fol. 15] of infringement and has a regular and established place of business." 28 U.S.C.A. §1400(b).

The plaintiffs say that none of the defendants reside in Illinois and have not committed in Illinois any acts of infringement, that process issued in Illinois could not have been served on the defendants and therefore the action could not "have been brought" in the district to which it was transferred. The attempted waiver, the plaintiffs say, is ineffectual.

It has been held in this Circuit that unless the district court has failed correctly to construe and apply the statute, consider the relevant factors incident to a motion to transfer, or has clearly abused its discretion, a Court of Appeals should not entertain applications for mandamus to enter or vacate orders of transfer under §1404(a). Ex Parte Chas. Pfizer & Co., 5 Cir. 1955, 225 F. 2d 720; Ex Parte Pharma-Craft Corporation, 5 Cir. 1956, 236 F. 2d 911. Cf. *Atlantic Coast Line R. Co.* v. *Davis*, 5 Cir. 1950, 185 F. 2d 766. In supporting the position that the district court erroneously construed and applied the statute in the determination, implicit in its order of transfer, that the action might have been brought in the Northern District of Illinois, the plaintiff-movants cite *Blackman* v. *Guerre*, 5 Cir. 1951, 190 F. 2d 427. In that opinion it was said with respect to the cause there decided that the action could not have been transferred under §1404(a) to the District of Columbia because a defendant was a resident of Louisiana. An examination of the opinion will show that the statement of the court was neither necessary to the decision nor upon a question involved in the appeal. [fol. 16] The decision is not a precedent on the question we have before us. The Supreme Court affirmed *Blackman* v. *Guerre* without considering the point with which we are here concerned. *Blackman* v. *Guerre*, 342 U. S. 512, 72 S. Ct. 410, 96 L. Ed. 534.

There are a number of district court decisions holding that even though a defendant moves for a transfer, the court has no power to grant the motion where the defendants are not subject to service in the transferee district. *Hampton Theatres, Inc.* v. *Paramount Film Distributing Corp.*, D.C.D.C. 1950, 90 F. Supp. 645; *Johnson* v. *Harris*, D.C. Tenn. 1953, 112 F. Supp. 338; *Sheridan* v. *Pan-American Refining Corp.*, D.C.N.Y. 1954, 123 F. Supp. 81; *General Electric Co.* v. *Central Transit Warehouse Co.*, D.C.Mo. 1955, 127 F. Supp. 817; *Mitchell* v. *Gundlach*, D.C.Md. 1955, 136 F. Supp. 169; *Felchlin* v. *American Smelting & Refining Co.*, D.C.Calif. 1955, 136 F. Supp. 577. The rule which to us seems the better reasoned and which has been adopted by the majority of the courts, permits the transfer upon the motion or with the consent

of the defendants even though they could not have been served with the process of the transferee court. *Paramount Pictures, Inc.* v. *Rodney*, 3 Cir. 1951, 186 F. 2d 111, cert. den. 340 U. S. 953, 71 S. Ct. 572, 95 L. Ed. 687; *Anthony* v. *Kaufman*, 2d Cir. 1951, 193 F. 2d 85, cert. den. 342 U. S. 955, 72 S. Ct. 629, 96 L. Ed. 710; In re Josephson, 1 Cir. 1954, 218 F. 2d 174; *Torres* v. *Walsh*, 2nd Cir. 1955, 221 F. 2d 319. A number of district court decisions arrive at like results. The purposes for which §1404(a) was enacted would be unduly circumscribed if a transfer could not be made "in the interest of justice" to a district where the defendants not only waive venue but to which [fol. 17] they seek the transfer. The interpretation of the phrase "where it might have been brought", as used in 28 U.S.C.A. §1404(a), is discussed at length by Chief Judge Magruder of the First Circuit in the case of in re Josephson, *supra*. We need not labor the point here.

The district court was empowered by the statute to make the transfer. It is not shown that the district court misconstrued or misapplied the statute or failed to consider all pertinent facts. No abuse of discretion is shown. The rule announced in Ex Parte Chas. Pfizer & Co., *supra*, is applicable. The motion for leave to file a petition for a writ of mandamus is

DENIED.

[fol. 18]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action No. 58 C 127

JOHN F. BLASKI, PETER S. PEDERSEN, M-P-H MANUFACTURING CORPORATION, INC., and PETER S. PEDERSEN, JR., EDWARD MARTIN, and PETER S. PEDERSEN, Co-Partners, doing business as Central Farm Equipment Company, Plaintiffs,

v.

R. P. HOWELL, JR. and LIFETIME METAL BUILDING COMPANY, Defendants.

MOTION BY PLAINTIFFS FOR AN ORDER TRANSFERRING AND REMANDING THIS CAUSE TO THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION—January 27, 1958

Now come the Plaintiffs in the above-entitled Action, by their undersigned attorneys, and present this their Motion for an Order transferring and remanding the above-entitled cause to the United States District Court for the Northern District of Texas, Dallas Division, on the following grounds:

1. Plaintiffs, on March 1, 1957, filed a complaint in the above-entitled cause in the United States District Court, Northern District of Texas, Dallas Division, Civil Action No. 7007 in that Court;

2. Defendants, on or about March 20, 1957, filed their answer in the above-entitled cause in the United States District Court, Northern District of Texas, Dallas Division;

[fol. 19] 3. The nature of the cause of action alleged in said complaint is that the rights of the Plaintiffs under two United States Letters Patent were and are being infringed by the defendants in the Northern District of Texas, and praying for injunctive relief and damages;

4. All of the defendants in said cause of action reside, and are doing business, within the Northern District of Texas, Dallas Division, while no one of the defendants either resides, or is doing business, within the Northern District of Illinois;

5. The acts of patent infringement alleged in the complaint were committed by the defendants in the Northern District of Texas, and no acts of infringement have been committed by any of the defendants in the Northern District of Illinois within the knowledge or belief of the plaintiffs;

6. The above-entitled Action was properly brought by the plaintiffs in the United States District Court, Northern District of Texas, Dallas Division, under the provisions of Sec. 1400(b), Title 28, U.S.C.A.;

7. The above-entitled cause, over the objections of the plaintiffs, was improperly transferred to this Court by the United States District Court, Northern District of Texas, Dallas Division;

[fol. 20] 8. The reason that said transfer by the United States District Court, Northern District of Texas, Dallas Division, was and is improper, is that Court was and is without power to make such transfer;

9. The Order of transfer of the United States District Court, Northern District of Texas, Dallas Division, was and is a nullity, and is not binding upon this Court, and this Court does not have jurisdiction of this cause of action and should transfer and remand this cause to the United States District Court, Northern District of Texas, Dallas Division, for further proceedings; and

10. For other reasons apparent upon the face of the record.

/s/ Lloyd C. Root, /s/ Daniel V. O'Keeffe, Marzall, Johnston, Cook & Root, 135 South LaSalle Street, Chicago 3, Illinois.

/s/ John O'C. Fitzgerald per LCK, 10 South LaSalle Street, Chicago, Illinois (Attorneys for Plaintiffs).

Chicago, Illinois
January 27, 1958

[fol. 21]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

OPINION OF JUDGE JULIUS J. HOFFMAN DENYING MOTION TO TRANSFER—March 14, 1958

The Clerk: 58 C 127. John F. Blaski, *et al.* *versus* R. P. Howell, Jr., and Lifetime Metal Building Company.

The Court: I think I might run through this very fast. This is a motion to retransfer this cause to the Northern District of Texas. It came to me from Judge Perry's calendar, because of the fact the patent involved was the

same as was involved in the other three cases which have gone to Judge Miner.

It appears that the plaintiffs here are residents of the Northern District of Illinois and that the defendants are residents of Texas. The plaintiffs assert that none of the defendants resides or does business in the Northern District of Illinois. The plaintiffs instituted an action for patent infringement in the Northern District of Texas. It is asserted by the plaintiffs that the acts of infringement occurred in the Northern District of Texas and that no acts of infringement occurred in the Northern District of Illinois. As far as I can tell, the defendants have not contested these assertions as to location, and I assume their truth for the purpose of deciding this motion.

Pursuant to 28 USC Section 1404 (a), the defendants moved to transfer the Texas action to the Northern District of Illinois. The trial court granted the motion and [fol. 22] upon appeal by the plaintiffs in the form of mandamus the Fifth Circuit affirmed. The Supreme Court denied certiorari. *Ex parte Blaski*, 245 F. 2d 737 (Fifth Circuit, 1957, *certiorari denied* 355 U. S. 872 (1957). Accordingly the action was brought here.

Now, asserting that the Texas court lacked jurisdiction to transfer the action to Illinois, the plaintiffs moved to transfer the action back to Texas, and in connection with that motion, I refer to the section of the statute with which we are all familiar, but for the record, I will read it:

28 USC Section 1404 (a):

> "For the convenience of the parties and witnesses in the interest of justice a District Court may transfer any civil action to any other district or division where it might have been brought."

28 USC 1400 (b) sets forth the venue requirement in cases of patent infringement:

> "Any civil action for patent infringement may be brought in the judicial district where the defendant resides or where the defendant has committed acts of [fol. 23] infringement and has a regular and established place of business."

If the plaintiffs had instituted action in this district, the defendant could have asserted correctly that venue was improper. We cannot find any relevant code provision pertaining to service of process in patent cases. Therefore I conclude that this case is governed by the general provision of Rule 4(f) of the Federal Rules of Civil Procedure, entitled "Territorial limits of effective service."

> "All process other than a subpoena may be served anywhere within the territorial limits of the state in which the District Court is held."

Although the plaintiffs have not so specifically alleged, it appears from the uncontradicted assertions of the plaintiffs that service of process upon the defendants could not be had in this district.

The plaintiffs in their brief assert that this district is not one in which the action might have been brought, using the words of 1404(a); that the Texas Court lacked jurisdiction to transfer this action; that this court may inquire into the jurisdiction of the Texas Court and that this court [fol. 24] must remand the action to Texas.

The defendants assert that the jurisdiction of the transferor court has already been determined by the Fifth Circuit and that the issue is therefore *res judicata*, and that if this court were to remand, the Texas court would refuse to accept the case. Initially, it must be determined whether this court may inquire into the jurisdiction of the Texas Court to transfer the action. I am of the opinion that this court may so inquire and that the doctrine of *res judicata* and the law of the case raise no barrier to such inquiry.

Absent 1404(a) a District Court would have no authority to transfer an action to another district, nor would a district court have authority to accept such a transfer.

Section 1404(a) was enacted to provide such authority or jurisdiction. Consequently the inquiry is one pertaining to jurisdiction of the Texas court to transfer the action. *Foster-Milburn* v. *Knight*, 181 F. 2d 949 (Second Circuit, 1950); and to the jurisdiction of this court to accept the transfer, *Fettig Canning Co.* v. *Steckler*, 188 F. 2d 715

[fol. 25] (Seventh Circuit). The transferee court must inquire into the jurisdiction of the transferor court.

United States v. *Reid*, 104 F. Supp. 260 (E. D. Arkansas, 1952).

Wilson v. *Kansas City Southern Railway Company*, 101 F. Supp. 56 (Western District of Missouri, 1951).

A transferee court must inquire into its own jurisdiction to accept the transfer.

Fettig v. *Steckler* which I mentioned before.

If either court lacks jurisdiction, the transferee court must remand the case to the transferor court.

Again I refer to the *Fettig* case and the *Reid* case, in that connection, and also the *Wilson* case.

The action of the transferee court is reviewable by mandamus. The *Fettig* case was a mandamus case involving Judge Steckler of Indianapolis.

The doctrine of *res judicata* and the law of the case, as I said a moment ago, cannot be imposed to remedy defects in jurisdiction.

That was said in the *Reid* case. Consequently I must determine whether the Texas court had jurisdiction to [fol. 26] transfer this case. I think the Texas court had jurisdiction to transfer the action to any other district where it might have been brought. So essentially the question relates to statutory interpretation in ascertaining the meaning of the phrase "Where it might have been brought."

First, we consider the practice prior to the enactment of 1404(a). At common law a Federal district court, applying the doctrine of *forum non conveniens* could properly dismiss an action without prejudice if there existed another more convenient district in which the plaintiff could reinstitute his action. The doctrine presupposed two forums in which the defendants were amenable to service.

Gulf Oil Company v. *Gilbert*, 330 U. S. 501 at 507 (1946).

Since it appears that the defendants are not amenable to process in Illinois, the doctrine of *forum non conveniens* could not have been applied in the case at bar.

Thus the ultimate issue presented by this motion is whether the same result must obtain under 1404(a) in the light of the phrase "Where it might have been brought." [fol. 27] The reviser's note to 1404(a) says this:

> "Subsection (a) was drafted in conformity with the doctrine of *forum non conveniens*."

Accordingly, early cases interpreting the section stated that the section merely codified the common law doctrine.

> Kaufman, Observations on Transfers, Section 1404(a).
> 10 FRD 595 at 598 (1951).

That is Judge Kaufman of the Southern District of New York.

More recent cases have expressed the view that 1404(a) constituted a substantial revision of the doctrine. *Norwood* v. *Kirkpatrick*, 349 U. S. 29 (1955).

Again I refer you to another article by Judge Kaufman. Further Observations on Transfers, under Section 1404(a) which he wrote for the Columbia Law Review.

> 56 Columbia Law Review, Page 1 (1956).

Although it may be accepted now that 1404(a) is broader in scope than the pre-existing practice, that fact alone does not resolve the question whether 1404(a) presupposes a transferee jurisdiction in which the defendant is amenable to service of process and in which venue is proper. Those [fol. 28] cases which assert that 1404(a) transcends the common law doctrine do not deal with this question.

There is no legislative history of reasonable applicability to the question. Accordingly, recourse must be had to the decided cases.

Four Circuits have considered the question and their decisions stand, I think, for the proposition that where the defendant moves to transfer an action to a district in which venue would be improper and/or the defendant would not be amenable to service of process, a waiver of these defects is effected. And the court has jurisdiction to transfer the action. The Supreme Court has denied certiorari in three cases in which certiorari was sought.

Ex parte Blaski, who is our friend Blaski in these cases; *In re Josephson*, 218 F. 2d 474 (First Circuit, 1954).
Anthony v. *Kaufman*, 193 F. 2d 85 (Second Circuit, 1951).
Certiorari denied, 342 U. S. 955 (1952).
Paramount Pictures v. *Rodney*, 186 F. 2d 111 (Third Circuit, 1951).
Certiorari denied, 340 U. S. 953 (1951).

Accord: *General Casualty Company* v. *Keller*, 154 Fed-
[fol. 29] eral Supplement 45. Eastern District of Wisconsin, 1957, and other district court cases which I do not now have before me.

Neither the Seventh Circuit nor the Northern District has been confronted with the question. In opposition to the cases cited above, other cases support the proposition that the district in which an action might have been brought is one in which venue and amenability to service of process exists apart from any consideration of waiver.

Shapiro v. *The Bonanza Hotel Co.*, 185 F. 2d 777 (Ninth Circuit, 1950).

General Electric Company v. *Central Transit Warehouse*, 127 Fed. Supp. 817 (Western District of Missouri, 1955); *Johnson* v. *Harris*, 112 F. Supp. 338 (Eastern District of Tennessee, 1953); *Hampton Theatres* v. *Paramount*, 90 F. Supp. 645 (D. D. C. 1950) and I suggest looking at the dissenting opinions in the *Paramount* v. *Rodney* case to which I referred a moment ago.

The leading case in support of transfer is the *Rodney* case. There action was instituted in Delaware under the Clayton Act. All 14 defendants moved to transfer to Texas. Although by statute service of process was nationwide in Clayton Act cases, venue in Texas was improper as to five defendants. The trial court determined that it had no jurisdiction to transfer. The defendants sought mandamus, [fol. 30] and it was held that the trial court did have jurisdiction. The problem was treated simply as one of waiver of venue. At pages 114 and 115, it is said:

"Suits embracing the identical subject matter could have been brought against the defendants in any district court in Texas. Moreover, if brought, these suits could have been maintained unless there had been a seasonable objection to the venue by the defendant.

"Even if the doctrine of *forum non conveniens* had been applied under the precise conditions required by the *Gulf Oil Company* v. *Gilbert*, those conditions are met by the instant circumstances, that is to say the Texas Court would have had the power to adjudicate the controversies and would have had jurisdiction of all defendants.

"By joining in the motion to transfer, the defendants have waived any objection to Texas venue and have agreed to submit themselves to a Texas court. We think that consent is to be given the same effect under Section 1404(a) as it would receive under any other [fol. 31] venue statute."

That is the end of that quotation.

Although there was no problem of service of process in the *Paramount* v. *Rodney* case as there is in the case with which we are concerned, the argument of waiver applies with equal vigor to the service of process. Service of process is an element of jurisdiction over the person, which jurisdiction can be waived.

In *Anthony* v. *Kaufman* to which I have alluded before, the plaintiff sued two defendants in New York. Both defendants moved to transfer to California. One of the two defendants was not amenable to service of process in California. The trial court transferred the action. Reviewing the decision of the trial court, Judge Frank stated, 193 F. 2d at 86:

"But here one defendant could have been served in the transferee district while the other defendant which could not have been served has joined in the application for and thus consented to the transfer. That consent is a waiver of lack of venue. If such waiver existed before the plaintiff commenced the suit, it [fol. 32] could have been brought there. We think 28 USC 1404 covers such a case."

In the *Josephson* case to which I have referred there was involved a shareholder's derivative action which was instituted in Massachusetts. The defendant moved to transfer the action to New Mexico where venue was proper but where service of process could not be had. The action was transferred, and the first circuit affirmed. Although the decision rested in large part upon the fact that venue was proper in New Mexico, Chief Judge McGruder specifically approved the *Paramount* and *Anthony* cases in a lengthy dictum. With reference to the problem of the service of process, it was stated at page 186, that is reported in 212 F. 2d,

> "they were already subject to the personal jurisdiction of the United States District Court for the District of Massachusetts by service of process upon them, and this personal jurisdiction was transferred to the United States District Court for the District of New Mexico by the effect of the transfer order."

The three cases which I have just discussed were cited with approval and followed by the Fifth Circuit in *Ex parte Blaski*. That the Fifth Circuit was disposed toward a liberal interpretation of 1404(a) was evidenced by the fol-
[fol. 33] lowing quotation:

> "The purposes for which 1404(a) was enacted would be unduly circumscribed if a transfer could not be made in the interest of justice to a district where the defendants not only waived venue, but to which they seek the transfer."

That is page 738, 245 F. 2d.

Many district court decisions are in accord with these cases. The plaintiffs' brief I observe makes no mention of these cases. Perhaps they would appear in some additional brief and I allowed one to be filed.

Now, as to cases rejecting the transfer to the Northern District of Illinois, as we all know a penetrating analysis of the problem is contained in the dissenting opinion in *Paramount* v. *Rodney*. Judges Hastie and McLaughlin noted that Congress had made specific provision for venue.

In many cases venue may exist in several districts. In their opinion it was logical to permit transfer only to those districts in which statutory venue existed.

At 186 F. 2d 117, it was said:

> [fol. 34] "It seems to us that in rejecting the specific venue provision governing actions under the Clayton Act as definitive of the limits of power to transfer suits under Section 1404(a) this court is holding that the latter statute empowers the District Court to transfer litigation to any district whatever if the court deems such action is just and convenient. In brief, the Court is holding that the concluding phrase in Section 1404(a), 'Where it might have been brought,' is surplusage."

In answer to the argument that a liberal construction of 1404(a) was to be preferred to further the ends of justice and convenience, it was said at page 118:

> "Whatever merit there may be in the matter of policy in the view implicit in the opinion of the court that a district court should be free to transfer cases according to justice and convenience without technical restrictions, we think Congress has not expressed or [fol. 35] embodied that policy in Section 1404(a). If such had been the intention of Congress we think the concluding phrase of Section 1404(a) would have been omitted, but that phrase was included and we should give it substantial effect according to its tenor."

In answering the argument that the concluding phrase of 1404(a) should be interpreted in the light of the rule that defects of venue may be waived, it was said at page 119:

> "But we do not see how the conduct of a defendant after suit has been instituted can add to the forums where 'it might have been brought'. In the normal meaning of words, this language in Section 1404(a) directs the attention of the judge who is considering

the transfer to the situation which existed when the suit was instituted."

In *Shapiro* v. *Bonanza Hotel Co.*, 185 F. 2d 777, coming out of the Ninth Circuit, 1950, the phrase "might have been brought" was interpreted to exclude those districts in which the defendant was not amenable to service of process. However, it is to be noted that plaintiff was the movant and the defendant had not, expressly or by implication, waived service of process.

[fol. 36]

In *United States against Reid*, to which I have referred before, the transferee court remanded to the transferor court because service of process could not have been had in the transferee's jurisdiction. However, again the plaintiff was the movant.

In *Johnson versus Harris*, the district court denied the defendant's motion to transfer, asserting without citation of authorities that statutory venue must exist in the transferee jurisdiction. In *Hampton Theatre against Paramount* to which we have referred, a similar conclusion was reached, again without citation of authorities. In a lengthy dictum in *General Electric Company versus Central Transit Warehouse*, to which we have previously referred, the district judge, now Mr. Justice Whitaker, expressly declined to follow *Paramount against Rodney*, and *Anthony against Kaufman* in a case in which the defendant was the movant for transfer.

Judge Whitaker relied *in toto* upon the reasoning of the dissenter in *Paramount against Rodney*.

Those cases which support the transfer of the case at bar to Illinois are approved in Moore, Federal Rules

[fol. 37]

and Official Forms, page 69, 1956, and Kaufman, Further Observations on Transfers, under Section 1404(a). That is the Columbia Law Review article to which I have previously referred. The plaintiff relies on those cases cited in Section 3 of its memorandum which I am not reading.

In addition, the plaintiff relies upon *Wilson versus Kansas City Southern Railway*, 101 Fed. Supp. 56 (Western District of Missouri, 1951). *Felchlin versus American*

Smelting, 136 Fed. Supp. 577 (Southern District of California, 1955).

The *Fettig* case, *Christopher against American News Company*, 176 F. 2d 11, a Seventh Circuit case decided in 1949.

Chicago, Rock Island and Pacific Railroad versus Igoe, 212 F. 2d 378 (Seventh Circuit, 1954).

In my view, the *Wilson* case is not in point. There the transferee court determined that the transferor court lacked jurisdiction over the person of the defendant. Accordingly the transferee court could not accept the case. It is my view also that the *Felchlin* case is not in point. There the transferee court determined in a diversity case that the law of the transferee state would not permit the plaintiff, a California executor, to main-
[fol. 38] tain the action.

The *Fettig* case is not in point in my view. There an action *in rem* for condemnation of food was instituted in Missouri. The *res* was before the Missouri District Court. By consent the action was transferred to Indiana. However, the *res* was not transferred. Accordingly it was determined that the transferee court lacked jurisdiction over the subject matter of the action.

In the *Christopher* case the defendant moved to transfer an action to New York asserting that companion cases were pending there. In a *per curiam* decision upholding the transfer the Seventh Circuit noted it was unlikely that the New York action could be transferred to Chicago because certain of the New York defendants could not be served in this district. The court's quotation relied upon by the plaintiff in the case at bar was dictum and I think vague, and I believe completely without authoritative value.

In the *Igoe* case the court was concerned only with its own power to review by mandamus the decision of the district court.

In referring to 1404(a), the court by way of dictum for no apparent reason asserted:

> [fol. 39] "This section presupposes two jurisdictions in which venue may be based. *Foster-Milburn Company versus Knight* (Second Circuit), 181 F. 2d 949."

In the cited case the Second Circuit held that upon motion by the plaintiff an action could not be transferred to a jurisdiction in which the defendant was not amenable to service of process. The Second Circuit reaches an opposite conclusion, where the defendant is the movant. I refer you in that connection again to *Anthony* v. *Kaufman*.

Gentlemen, personally I am of the opinion that the dissent in *Paramount against Rodney* is supported by the greater weight of reason and logic and that this Court, if I were to rely on my own personal inclination, should retransfer this case to Texas.

Those cases supporting transfer to this district, I think, do great violence to the established rules of statutory construction.

They seem to create a doctrine of retroactive waiver in order to reach the conclusion that the action might have been brought. I feel, however, I must follow the law as it [fol. 40] appears to me to be established, especially in view of the fact that the Supreme Court has consistently refused to grant certiorari to those cases supporting transfer to this district.

Accordingly, I deny the plaintiff's motion.

[fol. 41]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action No. 58 C 127

JOHN F. BLASKI, et al., Plaintiff,

v.

R. P. HOWELL, JR. and LIFETIME METAL BUILDING COMPANY, Defendants.

ORDER DENYING MOTION TO TRANSFER—March 14, 1958

This cause coming on to be heard on the motion of plaintiffs in the above entitled action for an order transferring

and remanding this case to the United States District Court, Northern District of Texas, Dallas Division, and the court having considered the briefs of counsel for plaintiffs and counsel for defendants, and having prepared memorandum relative to said motion, and being fully informed and advised in and relative thereto,

It Is Hereby Ordered that plaintiffs' motion for an order transferring and remanding this case to the United States District Court, Northern District of Texas, Dallas Division, is denied.

/s/ Julius J. Hoffman, United States District Judge.

[fol. 42]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 12285

JOHN F. BLASKI, PETER S. PEDERSEN, M-P-H MANUFACTURING CORPORATION, INC., PETER S. PEDERSEN, JR., EDWARD MARTIN, and PETER S. PEDERSEN, Co-Partners, doing business as Central Farm Equipment Company, Petitioners,

v.

HONORABLE JULIUS J. HOFFMAN, United States District Judge, Respondent.

PETITION FOR WRIT OF MANDAMUS—Filed March 21, 1958

To the Honorable Judges of the United States Court of Appeals for the Seventh Circuit:

The petition of the above named Petitioners, John F. Blaski, et al, respectfully shows that:

1. Petitioners, (Appendix, page 1) on March 1, 1957, filed a complaint charging patent infringement in a cause of action entitled John F. Blaski, Peter S. Pedersen, M-P-H Manufacturing Corporation, Inc., and Peter S.

Pedersen, Jr., Edward Martin, and Peter S. Pedersen, Co-Partners, doing business as Central Farm Equipment Company, Plaintiffs, v. R. P. Howell, Jr. and Lifetime Metal Building Company, Defendants, in the United States District Court, Northern District of Texas, Dallas Division, Civil Action No. 7007 in that Court;

[fol. 43] 2. The above named defendants, on or about March 20, 1957, filed their answer (Appendix, page 6) in the above mentioned cause in the United States District Court, Northern District of Texas, Dallas Division, and the cause was set for trial on May 31, 1957;

3. The nature of the cause of action alleged in said complaint is that the rights of Petitioners under two United States Letters Patent were and are being infringed by the defendants in the Northern District of Texas, and praying for injunctive relief and damages;

4. All of the aforementioned defendants in said cause of action reside, and are doing business, within the Northern District of Texas, Dallas Division, while no one of the defendants either resides, or is doing business, within the Northern District of Illinois;

5. The acts of patent infringement alleged in the complaint were committed by the defendants in the Northern District of Texas, and no acts of infringement have been committed by any of the defendants in the Northern District of Illinois, within the knowledge or belief of the plaintiffs;

6. The above entitled action was properly brought by the plaintiffs in the United States District Court, Northern District of Texas, Dallas Division, under the provisions of Sec. 1400(b), Title 28, U.S.C.A.;

[fol. 44] 7. The aforementioned cause of action, upon motion of the defendants, over the objections of the Petitioners, was improperly ordered transferred (Appendix, page 11) by the United States District Court, Northern District of Texas, Dallas Division, to the United States District Court, Northern District of Illinois, Eastern Division. Said cause was received and filed in the United States

District Court, Northern District of Illinois, Eastern Division, on January 27, 1958, was given Docket No. 58 C 127, and was assigned to the above identified respondent, the Honorable Julius J. Hoffman;

8. On that same day, namely, January 27, 1958, the Petitioners filed a motion (Appendix, page 18) in said United States District Court, Northern District of Illinois, Eastern Division, for an order transferring and remanding the aforementioned cause of action to the United States District Court, Northern District of Texas, Dallas Division, on the grounds that said United States District Court in Texas did not have the power to make the aforementioned transfer, and that said United States District Court, Northern District of Illinois, Eastern Division, did not and does not have jurisdiction of said cause of action and should transfer and remand same to the United States District Court, Northern District of Texas, Dallas Division, for further proceedings;

9. Briefs were filed by the plaintiffs and the defendants in the United States District Court, Northern District of [fol. 45] Illinois, Eastern Division, with reference to the aforementioned motion of the Petitioners;

10. On March 14, 1958, the respondent, the Honorable Julius J. Hoffman, handed down an oral opinion (Appendix, page 21) finding, contrary to law and to the decisions of this Court, that the United States District Court, Northern District of Texas, Dallas Division, did have the power to so transfer said cause of action, and that the United States District Court, Northern District of Illinois, Eastern Division, did have the power to accept said transfer and did have jurisdiction of said cause of action;

11. On that same day, the respondent, the Honorable Julius J. Hoffman entered an order (Appendix, page 41) denying the Petitioners' motion for an order transferring and remanding said cause of action to the United States District Court, Northern District of Texas, Dallas Division;

12. The reason that said transfer by the United States District Court, Northern District of Texas, Dallas Divi-

sion, was and is improper, is that that Court was and is without power to make such transfer, the Northern District of Illinois, Eastern Division, not being a district or division where the cause of action "might have been brought" within the meaning of Sec. 1404(a), Title 28, U.S.C.A., which is controlling in this matter;

13. The order of transfer of the United States District Court, Northern District of Texas, Dallas Division, was [fol. 46] and is void *ab initio*, and is not binding upon the United States District Court, Northern District of Illinois, Eastern Division, or this Court, and the United States District Court, Northern District of Illinois, Eastern Division, does not have jurisdiction of this cause of action and should remand and transfer the aforementioned cause of action to the United States District Court, Northern District of Texas, Dallas Division, for further proceedings;

14. The Respondent, in his opinion (Appendix, page 25), stated that:

(a) "The transferee court must inquire into the jurisdiction of the transferor court";

(b) "A transferee court must inquire into its own jurisdiction to accept the transfer";

(c) If either the transferor or transferee court lacks jurisdiction, "the transferee court must remand the case to the transferor court";

(d) "The action of the transferee court is reviewable by mandamus"; and

(e) The doctrine of *res judicata* and the law of the case does not raise any barrier to an inquiry by the transferee court as to the jurisdiction of either the transferor or transferee court.

[fol. 47] 15. Also, the Respondent, in his opinion (Appendix, page 39), stated that:

(a) In his opinion the dissent in the case of *Paramount Pictures* v. *Rodney* (CCA-3) 186 F.2d 111 (which

dissent supports the petitioners here) is supported by the greater weight of reason and logic;

(b) If he were to rely on his own personal inclinations, he should have retransferred this case to Texas;

(c) The cases which support the transfer of this case to this district do great violence to the established rules of statutory construction; and

(d) Those cases seem to create a doctrine of retroactive waiver in order to reach the conclusion that the action "might have been brought" in the transferee district.

16. In spite of this strong expression of personal conviction that this case should be remanded to Texas, the Respondent erroneously ruled (Appendix, pages 39 and 40) that he must follow the law as it appears to him to be established by decisions of Courts of Appeals in other Circuits, especially in view of the fact that the Supreme Court has refused to grant certiorari in those cases;

17. In so ruling the Respondent:

(a) Ruled contrary to the law and contrary to the obvious intent of Congress in enacting Sec. 1404(a), Title 28, U.S.C.A.;

[fol. 48] (b) Ruled contrary to the decisions of this Court;

(c) Ruled contrary to the weight of authority as expressed by the Courts of Appeals for the Seventh and Ninth Circuits, and the District Courts in the District of Columbia, and the Fourth, Sixth, Eighth and Ninth Circuits; and

(d) Erroneously construed the denial of certiorari by the Supreme Court of the United States as an affirmance of previously decided cases and having some kind of a binding effect upon him, which construction is contrary to the law as repeatedly expressed by the Supreme Court.

Wherefore, the Petitioners pray:

1. That an order be issued, directed to said Honorable Julius J. Hoffman, Judge of the United States District Court, Northern District of Illinois, Eastern Division, requiring him to show cause in this Court, at a time to be designated, why he should not vacate and set aside his order entered March 14, 1958, and grant the aforementioned motion of the Petitioners that said cause of action be remanded to the United States District Court, Northern District of Texas, Dallas Division;

2. That a Writ of Mandamus issue from this Court directing the Honorable Julius J. Hoffman, as Judge of the United States District Court for the Northern District of [fol. 49] Illinois, Eastern Division, to vacate and set aside his order entered March 14, 1958, and to order said cause of action remanded to the United States District Court, Northern District of Texas, Dallas Division, for further proceedings;

3. That Petitioners have such additional relief and process as may be necessary and appropriate in the premises.

/s/ Lloyd C. Root, /s/ Daniel V. O'Keeffe, Mazzall, Johnston, Cook & Root, 135 South LaSalle Street, Chicago 3, Illinois, /s/ John O'C. Fitzgerald, 10 South LaSalle Street, Chicago, Illinois (Attorneys for Petitioners).

Chicago 3, Illinois
March 21, 1958

[fol. 50]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Before

HON. W. LYNN PARKINSON, Circuit Judge.

ORIGINAL PETITION FOR WRIT OF MANDAMUS

No. 12285

JOHN F. BLASKI, PETER S. PEDERSEN, M-P-H MANUFACTURING CORP., INC., PETER S. PEDERSEN, JR., EDWARD MARTIN, and PETER S. PEDERSEN, Co-Partners, doing business as Central Farm Equipment Company, Petitioner,

v.

HON. JULIUS J. HOFFMAN, United States District Judge, Respondent.

RULE TO SHOW CAUSE—March 21, 1958

This matter comes before the Court on the petition of John F. Blaski, et al., for Writ of Mandamus and Brief in support.

On consideration whereof, It Is Ordered that Respondent show cause, if any there be, why a Writ of Mandamus should not issue as prayed by Petitioners by filing in the office of the Clerk of this Court an original and four (4) copies of his Response to this Rule on or before April 10, 1958.

[fol. 51]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Before

HON. J. EARL MAJOR, Circuit Judge.
HON. PHILIP J. FINNEGAN, Circuit Judge.
HON. ELMER J. SCHNACKENBERG, Circuit Judge.

ORIGINAL PETITION FOR WRIT OF MANDAMUS

No. 12285

JOHN F. BLASKI, et al., Petitioners,

v.

HON. JULIUS J. HOFFMAN, United States District Judge, Respondent.

ORDER DENYING PETITION FOR WRIT OF MANDAMUS—
July 1, 1958

This matter comes before the Court on the petition of John F. Blaski, et al., for a writ of mandamus, the response of respondent thereto, filed pursuant to a Rule To Show Cause heretofore issued by this Court, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the said petition of John F. Blaski, et al., for a writ of mandamus be, and the same is hereby, DENIED.

[fol. 52]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 12285

September Term and Session, 1958

PETITION FOR WRIT OF MANDAMUS ON PETITION FOR REHEARING

JOHN F. BLASKI, et al., Petitioners,

v.

HONORABLE JULIUS J. HOFFMAN, United States District Judge, Respondent.

OPINION GRANTING PETITION FOR WRIT OF MANDAMUS—October 16, 1958

Before MAJOR, FINNEGAN and SCHNACKENBERG, Circuit Judges.

MAJOR, Circuit Judge:

This Court, on July 1, 1958, rendered an opinion denying petitioners' petition for a writ of mandamus. Upon petition for rehearing, it is ordered that such opinion be withdrawn and that all orders entered pursuant thereto be vacated and set aside.

The facts which give rise to the legal issue for decision are not in dispute. Petitioners, as plaintiffs, on March 1, 1957 filed in the United States District Court, Northern District of Texas, Dallas Division (hereinafter referred to as the Texas Court or District), a complaint charging R. P. Howell, Jr. and Lifetime Metal Building Company with patent infringement. Plaintiffs reside or are doing business within the Northern District of Illinois (hereinafter referred to as the Illinois District). The complaint alleged acts of infringement committed by defendants in

[fol. 53] the Texas District, and no acts of infringement, so far as known, committed by either of the defendants in the Illinois District. Service of process was had upon defendants in the Texas District. Defendants answered the complaint and the case was set for trial.

In the meantime, defendants submitted a motion requesting transfer of the action to the Illinois District, under Title 28 U.S.C.A. Sec. 1404 (a), stating in their motion that defendants waived lack of venue in the Illinois District. Over objection of plaintiff (petitioners here), the Texas Court directed that, for the convenience of the parties and witnesses and in the interest of justice, the action be transferred to the Illinois District.

Plaintiffs, after denial of their motion to vacate the order of transfer, filed a petition for writ of mandamus in the United States Court of Appeals for the Fifth Circuit, requesting that Court to issue an order to show cause why a writ of mandamus should not be issued against the Texas District Judge, nullifying the transfer order. The Court of Appeals (5 Cir.) held that the District Court was empowered by statute to make the transfer, and denied leave to file the petition. *Ex Parte Blaski et al.*, 245 F. 2d 737.

The papers and records in the Texas District infringement action were received in the Clerk's Office of the Illinois District pursuant to the transfer order. Thereupon, petitioners filed a motion in the Illinois District for an order directing the transfer of and remandment of the action to the Texas District, on the ground that the Texas Court was without power to order the transfer and, consequently, the Illinois Court did not acquire jurisdiction. A hearing on the petition and response thereto was had before Honorable Julius J. Hoffman, a Judge of the Illinois District and respondent in the instant proceeding. Respondent, on March 14, 1958, entered an order denying petitioners' motion, and in an oral opinion stated his reasons therefor. Thereupon, petitioners filed in this Court the petition now before us for a writ of mandamus directing respondent to order such transfer and remand.

No question is raised, in fact all parties concede that under Sec. 1651 (a), Title 28 U.S.C.A., mandamus is an [fol. 54] appropriate means for testing the legality of the

order in controversy. Furthermore, our jurisdiction, if there be any doubt, is supported by the decision of this Court in *Chicago, R.I. & P.R. Co.* v. *Igoe*, 212 F. 2d 378.

The questions for decision appear to be correctly stated in petitioners' brief, and are as follows:

> "(1) Whether a district court, having proper venue and jurisdiction over defendants in a patent infringement action, has the power under Section 1404 (a), Title 28, U.S.C.A. to transfer the cause of action, on motion of the defendants and over the objections of the plaintiffs, to a district in which venue is not proper; and
>
> "(2) Whether, under such circumstances, the transferee court acquires jurisdiction, or has the power to accept such a transfer."

Two statutory provisions are pertinent: Secs. 1400 (b) and 1404 (a), Title 28 U.S.C.A. Section 1400 (b), a venue provision, specifically applicable to actions for patent infringement, provides:

> "Any civil action for patent infringement *may be brought* in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business. [Italics supplied.]"

Section 1404 (a), relating to change of venue, provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division *where it might have been brought*. [Italics supplied.]"

It is not open to doubt but that petitioners' action was properly brought in the Texas District, where defendants not only resided but where the acts of infringement took place and where defendants had their regular and established place of business. It appears plain, also, that venue could not properly have been laid in the Illinois District. A solution of the problem before us reduces itself to the legal effect to be given the concluding phrase of Sec. 1404 (a), "where it might have been brought." Does that phrase

refer to the district where such an action "may be brought" [fol. 55] under Sec. 1400 (b)? If the question was of first impression, we would have no hesitancy in answering in the affimative. It is a contradiction of terms and does violence to the plain, unambiguous language which Congress has employed, to reason that the Texas Court, with power to transfer the action only to a district "where it might have been brought," could exercise that power by ordering transfer to a district which it could not have been brought.

If the Texas District had the power on motion of defendants to transfer the action to the Illinois District, it likewise had the power on a similar motion to transfer it to any District Court in the United States. Counsel for respondent argues that the Illinois District was one where the action "might have been brought" because it had general jurisdiction of an action for patent infringement and acquired jurisdiction of defendants by their motion to transfer and their consent to trial in the Illinois District. Precisely the same argument could be made in support of the power of the Texas District if transfer had been made to any other District Court in the United States. Counsel's argument, if accepted, renders the phrase "where it might have been brought" meaningless. The transfer provision would be complete absent the phrase of limitation. This phrase, however, cannot be ignored under the guise of statutory construction; to do so amounts to statutory emasculation.

It must be clearly kept in mind that there is no issue of discretion involved in the instant matter either on the part of the Texas District Judge in ordering the transfer or on the part of the respondent in refusing to remand it. The sole issue is that of power on the part of one to transfer, on the part of the other to accept and entertain jurisdiction. Also, the general rule should not be overlooked that a Federal Court has only such jurisdiction or power as Congress has specifically conferred. The venue where a patent infringement action may be brought, as well as the district to which it may be subsequently transferred, has been clearly delineated by Congress.

When Congress provided for transfer to a district "where it might have been brought," it is hardly open to doubt but that it referred to a district where the plain-
[fol. 56] tiff, in a case sought to be transferred, had a right to bring the case. Under the decisions of the Supreme Court and other courts, the action could have been properly brought only in the district (1) where defendant resides or (2) where defendant has committed acts of infringement and has a regular and established place of business. Under the admitted facts, the action could have been properly brought only in the Texas District. Conversely, it could not have been properly brought in the Illinois District.

In *Stonite Products Co.* v. *Melvin Lloyd Co. et al.*, 315 U.S. 561, the question for determination was whether Sec. 48 of the Judicial Code (Title 28 U.S.C.A. Sec. 109) was the sole provision governing venue of patent litigation. Referring to that section, the Court stated (page 562):

> "Section 48 gives jurisdiction of suits for patent infringement to the United States district courts in the district of which the defendant is an inhabitant, or in any district in which the defendant shall have committed acts of infringement and have a regular and established place of business."

On the following page the Court stated:

> "We hold that Section 48 is the exclusive provision controlling venue in patent infringement proceedings."

Section 48, before the Court in Stonite, was the predecessor venue provision to Sec. 1400 (b) of the present Code. The holding in *Stonite*, however, is equally applicable to the present venue provision. *Fourco Glass Co.* v. *Transmirra Products Corp. et al.*, 353 U.S. 222. The Court in the latter case stated (page 228):

> "For it will be seen that Section 1400 (b) is equally clear and, also, that it deals specially and specifically with venue in patent infringement actions."

And again, on the following page:

> "We hold that 28 U.S.C. Sec. 1400 (b) is the sole and exclusive provision controlling venue in patent infringement actions * * *."

See also the recent opinion by Judge Mercer in *Gas Products Corp.* v. *George D. Roper Corp., et al.*, 147 F.Supp. 853.

[fol. 57] When Congress provided for the transfer of a case to a district "where it might have been brought," it meant the district where plaintiff has a recognized right to bring his case under the Venue Act and that this right was unqualified and absolute, not depending upon consent of the defendant, evidenced by waiver, entry of appearance, or otherwise. If when a suit is commenced, plaintiff has a right to sue in that district, independently of the wishes of defendant, it is a district "where it might have been brought." If he does not have that right, independently of the wishes of defendant, it is not a district "where it might have been brought," and it is immaterial that the defendant subsequently acquiesces. The test is, did the plaintiff have an independent right to commence suit in the district to which it is sought to make transfer? If so, it is a district "where it might have been brought"; otherwise, it is not such a district. We recognize, of course, that venue may be waived under proper circumstances, but we do not think it can be waived in a forum in which an action has not and could not have been properly brought by the opposing party. To hold otherwise is to permit a defendant to select a forum not available to a plaintiff as a matter of right, and over plaintiff's objection.

Respondent in his brief states:

> "Petitioners fail to recognize the difference between jurisdiction of the subject matter and venue over the particular defendants. The District Court had jurisdiction of the subject matter at the time the original suit was brought by reason of the very nature of the suit, *i.e.*, patent infringement."

True, every District Court has jurisdiction over patent infringement litigation generally but the suggestion must be novel, certainly not sound, that the Illinois Court ac-

quired jurisdiction of the subject matter of the instant action at the time it was brought in the Texas District. No court, so far as we are aware, in an action for patent infringement or any other, acquires jurisdiction either of the subject matter or of the parties until the action is properly brought in such court. Furthermore, it begs the question to suggest that the Illinois Court acquired jurisdiction via the transfer because that is dependent upon the issue [fol. 58] for decision, that is, whether Congress has endowed the transferring court with power to order the transfer. As shown, the action could not properly have been brought in the Illinois Court, and, therefore, it was not a district "where it might have been brought." Consequently, the Texas Court was without power to order the transfer and the Illinois Court acquired neither jurisdiction nor venue of the action.

Our conclusion is based upon what we think is a clear congressional mandate. In *Ex Parte Collett*, 337 U.S. 55, the Court held that the phrase "any civil action" found in Sec. 1404 (a) was applicable to an action under the Federal Employers' Liability Act. In so doing the Court stated (page 58):

> "The court below relied on the language of Sec. 1404 (a), *supra*, which it regarded as 'unambiguous, direct, clear.' We agree. The reach of 'any civil action' is unmistakable. The phrase is used without qualification, without hint that some should be excluded."

In our view, the phrase "where it might have been brought" contained in the same section is equally unambiguous, direct and clear.

Notwithstanding the emphatic view which we entertain, it must be conceded that a solution of the problem has engendered much controversy in the courts and that there is respectable opposing authority, although upon analysis it is not as imposing as counsel would have us believe. An attempt to distinguish or analyze such cases in detail would unduly prolong this discussion. A reading of all the cases where the question has been considered leads

to the view that the weight of authority sustains our conclusion in the matter.

Respondent asserts that four Courts of Appeals have sustained the power of the court to transfer under the circumstances of the instant case. *Ex Parte Blaski et al.*, 245 F.2d 737 (5 Cir.); *In Re Josephson*, 218 F.2d 174 (1 Cir.); *Anthony* v. *Kaufman*, 193 F.2d 85, and *Torres* v. *Walsh*, 221 F.2d 319 (2 Cir.); *Paramount Pictures, Inc.* v. *Rodney*, 186 F.2d 111 (3 Cir.). We regard *Blaski* as the most important of these cases because the Court refused to entertain a petition for mandamus directing the [fol. 59] Texas District to vacate its order of transfer in the instant case. With great respect for that Court, we think its opinion discloses that it, like some other Courts, confused the issue of power to transfer with that of discretion where the power existed. In its opinion the Court stated (page 738):

> "The purposes for which Sec. 1404 (a) was enacted would be unduly circumscribed if a transfer could not be made 'in the interest of justice' to a district where the defendants not only waive venue but to which they seek the transfer."

This reasoning, so we think, ignores the statutory limitation of the power to transfer to a district "where it might have been brought." More than that, a court has no more right to unduly enlarge than it has to unduly circumscribe a limitation which Congress has specifically provided. In any event, we think the decision of the Fifth Circuit in this matter is erroneous. Such being the case, we are under no more obligation to follow it as the law of the case than that Circuit would be to follow what it considers an erroneous decision by this Court. See *Wilson* v. *Kansas City Southern Ry. Co. et al.*, 101 F.Supp. 56, 60.

In all the other cases above cited, except *Torres* v. *Walsh*, it appears that one or more of the defendants would have been sued in the district to which the action was transferred. Thus, the action "might have been properly brought" in such district. The *Torres* case involved an *in rem* proceeding in admiralty which presented a different situation as to venue and service. Notwithstanding

that some points of distinction may be drawn between the cited cases (except *Blaski*) and the instant case, it is fair to state that all of these cases contain language which in one way or another supports the power of the Texas Court in the instant matter.

The case most relied upon by respondent is *Paramount Pictures, Inc.* v. *Rodney*, 186 F.2d 111. This case was decided by a court of five judges, two of whom dissented (Judges Hastie and McLaughlin). With due respect to the majority, we agree with the reasoning and logic of the dissenting opinion. The dissent states (page 119):

> "But we do not see how the conduct of a defendant after suit has been instituted can add to the forums [fol. 60] where it might have been brought.' In the normal meaning of words this language of Section 1404 (a) directs the attention of the judge who is considering a transfer to the situation which existed when suit was instituted."

In agreeing with the dissenting members of that Court, we find ourselves in good company. In *General Electric Co.* v. *Central Transit Warehouse Co. et al.*, 127 F.Supp. 817, Judge Whittaker (then a District Judge, now a Justice of the Supreme Court) also agreed with the dissenting members in the *Paramount Pictures* case. More than that, he analyzed and distinguished that case on its facts. In our view, the opinion by Judge Whittaker is sound. His reasoning and logic is unassailable and we think he reached the correct result. A striking statement in his opinion, referring to the construction there sought as it is here, of the phrase "where it might have been brought," is (page 826):

> "Would not such construction be to read that phrase entirely out of the statute? Would not such construction permit transfer of the action to *any district desired by the moving defendants*, though they, or some of them, could not have been served with process there, and no statutory venue existed there, and the action could not have been maintained there, without their intentional waiver of venue and entry of general appearance? I think no such treatment can be given to

that phrase in the statute. It, says Judge Learned Hand, '"presupposes at least two forms in which the defendant is amenable to process."' *Foster-Milburn Co.* v. *Knight*, 2 Cir., 181 F.2d 949, 952."

We have read with interest Judge Hoffman's opinion. He makes a fair and detailed analysis of numerous cases. His counsel in this Court stated: "We, as counsel, cannot improve upon the discussion of the law on this subject which was included in Respondent's opinion." We agree that counsel have not improved upon Judge Hoffman's opinion. Among other things he stated:

> "Gentlemen, personally I am of the opinion that the dissent in *Paramount* against *Rodney* is supported by the greater weight of reason and logic and that [fol. 61] this Court, if I were to rely on my own personal inclination should retransfer this case to Texas.
>
> "Those cases supporting transfer to this district, I think, do great violence to the established rules of statutory construction.
>
> "They seem to create a doctrine of retroactive waiver in order to reach the conclusion that the action might have been brought."

After having thus reasoned, he concluded:

> "I feel, however, I must follow the law as it appears to me to be established, especially in view of the fact that the Supreme Court has consistently refused to grant certiorari to those cases supporting transfer to this district."

It thus appears that respondent reasoned one way and decided the other. Certainly he had no sound basis for attaching weight to the fact that the Supreme Court has refused to grant certiorari in the cases supporting transfer. See *Agoston* v. *Commonwealth of Pennsylvania*, 340 U.S. 844, 845.

We have heretofore quoted from Judge Whittaker's opinion in *General Electric Co.* v. *Central Transit Warehouse Co. et al.*, 127 F.Supp. 817, which includes a state-

ment from *Foster-Milburn Co.* v. *Knight* (2 Cir.), 181 F.2d 949, 952, that it (referring to Sec. 1404 (a)) "presupposes at least two forums in which the defendant is amenable to process." This Court, in *Chicago, R.I. and P.R. Co.* v. *Igoe,* 212 F.2d 378, 379 (footnote), cited with approval the statement from the *Foster-Milburn* case. Numerous District Courts have embraced this view of the transfer section. *Ngchtman* v. *Jones & Laughlin Steel Corp.,* 90 F.Supp. 739, 740; *Wilson* v. *K.C. Southern Ry. Co. et al.,* 101 F.Supp. 56; *Johnson* v. *Harris,* 112 F.Supp. 338, 341; *Mitchell* v. *Gundlach,* 136 F.Supp. 169, 172; *Felchlin* v. *American Smelting & Refining Co.,* 136 F.Supp. 577, 581; *Hill* v. *Upper Mississippi Towing Corp.,* 141 F.Supp. 692, 694; *Gilpin* v. *Wilson,* 148 F.Supp. 493.

In the last cited case, the latest which we find on the subject, the Court after reviewing the case law decided that the transferee district must be one where the action might have been originally brought. In so deciding, the Court stated (page 494):

> [fol. 62] "The Court, while recognizing the divergence of authority on this question, is persuaded that a district wherein the action 'might have been brought' infers that the transferee district must be not only a district wherein venue lies and a complaint may be filed, as indeed one may file a complaint at will, but the transferee district must also be one in which the action might have been legally maintained and service of process effected upon the defendant. This view comprises the weight of authority and is represented by well-reasoned decisions from both the Second and Ninth Circuits."

(*Foster-Milburn Co.* v. *Knight,* 2 Cir., 181 F.2d 949, and *Shapiro* v. *Bonanza Hotel Co.,* 9 Cir., 185 F.2d 777.) The Court in *Gilpin* cites other cases which have expressed the same view, including *Blackmar* v. *Guerre et al.* (5 Cir.), 190 F.2d 427, 429, wherein the Court stated:

> "Transfer under those sections [1404 (a) and 1406 (a)] is limited to districts where the suit could be originally brought. [Citing cases.]"

In *Ex Parte Collett*, 337 U.S. 55, the Court considered the doctrine of *forum no* (sic) *conveniens* as it relates to Sec. 1404 (a). In that connection, the Court discussed the transfer section together with the venue provision there involved. While the issue in the instant case was not directly involved, we think the reasoning by analogy supports the view that the transferee district must be one where the action could have been properly brought. (See pages 59 and 60.) Counsel for respondent attempt to escape the reasoning of *Collett* on the basis of *Norwood* v. *Kirkpatrick*, 349 U.S. 29, which it is claimed broadened the scope to be awarded Sec. 1404 (a). The suggestion is without merit. *Norwood* had nothing to do with the statutory limitation on the power of a District Court to transfer. The case is concerned solely with the matter of the Court's discretion. The Court stated (page 32):

> "As a consequence, we believe that Congress, by the term 'for the convenience of parties and witnesses, in the interest of justice,' intended to permit courts to grant transfers upon a lesser showing of inconvenience. This is not to say that the relevant factors have changed or that the plaintiff's choice of forum [fol. 63] is not to be considered, but only that the discretion to be exercised is broader."

For a discussion of the *Norwood* case see *Clayton* v. *Swift & Co.*, 137 F.Supp. 219, 221.

So that there will be no misunderstanding as to our position on the power of a District Court to transfer an action to another district, we refer to a recent opinion of this Court. *General Casualty Co.* v. *Grubb*, 253 F.2d 51. Unfortunately this case is sometimes cited in support of the thesis that a District Court has the power to transfer to a forum where the action could not have been originally brought. Whether the issue of power was before the Court in the *Grubb* case the opinion does not disclose. If so, it is evident that the issue was undecided. The case was decided solely on the issue of the District Court's discretion to order the transfer. As the Court stated (page 53):

> "On the other hand, we are appraising discretion exercised under Sec. 1404 by the district court and all we can do is to determine whether the respondent Judge abused it while at the same time, guarding against substituting our discretion for his."

The writ of mandamus is allowed, and respondent is directed to vacate and set aside his order entered March 14, 1958, and to order the action remanded to the United States District Court, Northern District of Texas, Dallas Division.

FINNEGAN, Circuit Judge, Dissenting. An opinion in this case, written by me, and in which Judge Major and Judge Schnackenberg joined with me, was handed down July 1, 1958. Now my two colleagues have changed their position, and on rehearing ordered withdrawal of our earlier unanimous opinion. Since I adhere to my original position of refusing the peremptory writ of mandamus in this case, I am explaining my reasons for dissenting.

At the outset, I underscore two items. (1) The record underlying this current majority opinion has remained unchanged since the day when we three judges handed down our first *Blaski* opinion. (2) John F. Blaski, MPH Manufacturing Corporation, Inc., Peter S. Pedersen, Peter [fol. 64] S. Pederson, Jr., co-partners d/b/a Central Farm Equipment Company, petitioners here, had earlier, October 3, 1955, sought a writ of mandamus in our Court to expunge Judge Tehan's order transferring their case brought in the Eastern District of Wisconsin against Inland Steel Products Company, LeRoy Hermann and Robert Anderson, defendants, from the Eastern District of Wisconsin to the Northern District of Illinois for consolidation with other suits then pending in the latter District Court. Those cases involve the same patent as the case at bar. Judge Schnackenberg joined with Judge Lindley in an order, entered October 3, 1955, denying the petition of Blaski, et al. for mandamus. The petition for a writ of mandamus in that case shows Blaski, et al. challenged the power of Judge Tehan to transfer, or in the alternative, claimed the District Judge abused his discretion.

Ex Parte Blaski, 245 F. 2d 737 (5th Cir. 1957) is the Fifth Circuit's opinion denying leave to file a petition for a writ of mandamus to vacate the order entered by the United States District Court in Texas transferring the case at bar to the Northern District of Illinois. Judge Jones, speaking for the Fifth Circuit, when rejecting the petition presented by Blaski, et al., pointed out (245 F. 2d 737):

> "The movants here, who were plaintiffs in the district court, have their *residence* in the Northern District of Illinois. They instituted suit in the district court for the Northern District of Texas against several defendants, all of whom reside in the Northern District of Texas . . . The defendants made a motion to transfer the cause, pursuant to 28 U. S. C. A. § 1404(a), to the Northern District of Illinois. In their motion the defendants stated that their witnesses were much closer to the court in Illinois than to the court in Texas. They also state, among other averments, *that there is pending in the district court for the Northern District of Illinois a consolidated action in which the plaintiffs in the Texas suit* were charging infringement of the *same patent as was involved in the suit in Texas.* It was shown that in the action in the Northern District of Illinois much pre-trial information and evidence had been developed which would be relevant in the case commenced in the Northern [fol. 65] District of Texas. *The defendants waived their right to be sued in the Northern District of Texas and consented to the consolidation of the action with the cause pending in Illinois.* . . .
>
> "The plaintiffs say that none of the defendants reside in Illinois and have not committed in Illinois any acts of infringement, that process issued in Illinois could not have been served on the defendants and therefore the action could not 'have been brought' in the district to which it was transferred. The attempted waiver, the plaintiffs say, is ineffectual." (Italics supplied)

As I understand Judge Major's opinion in this rehearing, he holds that unless there is venue under 28 U. S. C. § 1400 in at least two forums, a trial judge is restrained from basing any order of transfer on 28 U. S. C. § 1404 (a). In reaching that result Judge Major disagrees, as I view it, with the Fifth Circuit that a transfer is proper on motion of a defendant who consents to the transfer (by waiving venue in the transferor court) even though the defendant is not amenable to venue in the transferee court selected by such movant, I doubt if any one would seriously urge that the *Fourco Glass Co.* v. *Transmirra Corp.*, 353 U. S. 222 (1957) holding precludes all transfers of patent cases when § 1404 (a) is involved, especially after noticing the words "any civil action" used by Congress in § 1404(a).

Literally speaking, the defendants-litigants in the case before us; "waived their right to be sued in the Northern District of *Texas*" [See 245 F. 2d 737]; they did not, with all deference to Judge Major, waive venue "in a forum in which an action had not been and could not be properly brought by an opposing party."

Venue under 28 U. S. C. § 1400 (b) means only the place where these defendants could require the case to be tried and, as a word "venue" refers neither to jurisdiction nor power to decide the case. Locality of trial is a personal privilege which these defendants could waive. *In Re Josephson*, 218 F. 2d 174, 184-185 (5th Cir. 1954), and cases there collected. Venue for commencing patent suits is predetermined by § 1400 (b), but there is nothing in that section contained preventing the place of trial from [fol. 66] being shifted in accordance with the yardsticks of "the convenience of parties and witnesses in the interest of justice," provided by § 1404. These Texas defendants have consented to consolidation of the Texas suit with those long since pending in Illinois.

I think the Fifth Circuit penetrated the problem at hand and soundly concluded that:

> "The rule which to us seems the better reasoned and which has been adopted by the majority of the courts, permits the transfer upon the motion or with the consent of the defendants even though they could

not have been served with the process of the transferee court . . . " (245 F. 2d 737, 738).

Judicial discretion came into play after the defendant waived venue in Texas and consented to the consolidation with Illinois pending litigation on the same patents. Rather than abuse of discretion I find the District Judge in Texas displayed some sound practical common sense. Indeed I think the bare words "where it might have been brought" in § 1404 (a), are being used here as an intellectual go-cart just to wheel the case back again to Texas. This case ought to be resolved on its peculiar facts and against the background of lawsuits begun by Blaski, et al. in Wisconsin and Texas. As I have previously said, there appears to be no legalistic reason just why the respondent judge should overrule the Fifth Circuit. I would deny the petition for writ of mandamus just as I would have struck down a petition in the nature of a writ prohibition, which at least would have been potentially more appropriate.

[fol. 67]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Before

HON. J. EARL MAJOR, Circuit Judge.
HON. PHILIP J. FINNEGAN, Circuit Judge.
HON. ELMER J. SCHNACKENBERG, Circuit Judge.

PETITION FOR WRIT OF MANDAMUS ON PETITION FOR REHEARING

No. 12285

JOHN F. BLASKI, et al., Petitioners,

v.

HONORABLE JULIUS J. HOFFMAN, United States District Judge, Respondent.

ORDER ALLOWING WRIT OF MANDAMUS—October 16, 1958

This matter comes before the Court on the petition for rehearing filed by petitioners John F. Blaski, et al., and the reply of respondent thereto.

On consideration whereof it is ordered and adjudged by this Court that the opinion of this Court heretofore filed in this matter on July 1, 1958 be, and the same is hereby withdrawn and that all orders entered pursuant thereto be vacated and set aside.

It is further ordered and adjudged by this Court that the petition of petitioners John F. Blaski, et al. for a writ of mandamus be allowed, and the respondent is directed to vacate and set aside his order entered March 14, 1958 and to order the civil action, docket No. 58 C 127, John F. Blaski, et al., plaintiffs, vs. R. P. Howell, Jr. and Lifetime Metal Building Company, defendants, remanded to the United States District Court for the Northern District of Texas, Dallas Division, in accordance with the opinion of this Court filed this day.

[fol. 68]

CORRECTED

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Before

HON. F. RYAN DUFFY, Chief Judge.
HON. PHILIP J. FINNEGAN, Circuit Judge.
HON. ELMER J. SCHNACKENBERG, Circuit Judge.
HON. JOHN S. HASTINGS, Circuit Judge.
HON. W. LYNN PARKINSON, Circuit Judge.
HON. WIN G. KNOCH, Circuit Judge.

ORIGINAL PETITION FOR WRIT OF MANDAMUS

No. 12285

JOHN F. BLASKI, et al., Petitioners,

v.

HONORABLE JULIUS J. HOFFMAN, United States District Judge, Respondent.

ORDER DENYING PETITION FOR REHEARING EN BANC—November 25, 1958

On consideration of the motion of counsel for Philip L. Sullivan, Chief Judge of the United States District Court for the Northern District of Illinois,

It Is Hereby Ordered that the brief as Amicus Curiae of Philip L. Sullivan, Chief Judge of the United States District Court for the Northern District of Illinois, tendered to the Clerk of this Court on October 25, 1958 be filed instanter.

As a majority of the Judges in active service have not voted in favor of granting a rehearing en banc,

It Is Hereby Ordered that the petition for rehearing *en banc* filed herein on October 23, 1958 be, and the same is hereby Denied.

(Finnegan, Circuit Judge: I vote to grant the petition for rehearing en banc.)

(Knoch, Circuit Judge: I vote to grant the petition for rehearing en banc.)

[fol. 69] Clerk's Certificate to foregoing transcript (omitted in printing.)

[fol. 70]

SUPREME COURT OF THE UNITED STATES

No. 597—October Term, 1958

ORDER ALLOWING CERTIORARI—February 24, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

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DEC 22 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. [redacted] 25

HONORABLE JULIUS J. HOFFMAN, A JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION,

Petitioner,

vs.

JOHN F. BLASKI, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. .....

HONORABLE JULIUS J. HOFFMAN, A JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION,

Petitioner.

vs.

JOHN F. BLASKI, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on October 16, 1958.

OPINIONS BELOW.

The opinion of the District Court (App. p. 1a) was not reported. The opinions announced by the Court of Appeals on July 1, 1958 (App. p. 14a) and October 16, 1958 (App. p. 15a) have not been reported as of this date.

JURISDICTION.

The judgment of the United States Court of Appeals for the Seventh Circuit was made and entered on October 16, 1958 (App. p. 33a). A petition for rehearing *in banc* was filed on October 23, 1958, and was denied on November 25, 1958 (App. p. 35a). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

28 U. S. C. § 1404(a) confers authority on a United States District Court to transfer a civil action to any other district "* * * where it might have been brought." If the transfer of an action would serve the convenience of parties and witnesses and would be in the interest of justice, does 28 U. S. C. § 1404(a) confer upon a United States District Court statutory authority to transfer an action, upon motion of all defendants, to another United States District Court having jurisdiction of the subject matter, but located in a district in which venue and jurisdiction over the person would be improper if the action had been instituted there and the defendants had duly objected?

STATUTE INVOLVED.

This case involves 28 U. S. C. § 1404(a), 62 Stat. 937 (1948) which provides as follows:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

STATEMENT OF THE CASE

On March 1, 1957, the respondents filed suit in the United States District Court for the Northern District of Texas. It was alleged that respondents' patent had been infringed by R. P. Howell, Jr., a resident of Texas and Lifetime Metal Building Company, a Texas corporation not doing business in Illinois. Pursuant to 28 U. S. C. § 1404(a), the defendants moved to transfer the case to the United States District Court for the Northern District of Illinois because two other cases involving the same patent were pending in that court and because numerous witnesses resided in that district. The defendants expressly waived their objection to venue and personal jurisdiction. The Texas court determined that the transfer would serve the convenience of the parties and witnesses and that it would be in the interest of justice. Accordingly, the Texas court, in the exercise of its discretion, ordered the action transferred.

The respondents then sought a writ of mandamus in the United States Court of Appeals for the Fifth Circuit. The sole argument made by the respondents was that the Northern District of Illinois was not a district where the action "might have been brought" within the meaning of 28 U. S. C. § 1404(a), and that the Texas court lacked authority to transfer the action. However, the United States Court of Appeals for the Fifth Circuit held that the transfer was within the provisions of 28 U. S. C. § 1404(a) and denied the respondents' motion for leave to file a petition for a writ of mandamus. *Ex Parte Blaski*, 245 F. 2d 737 (5th Cir. 1957), cert. denied, 355 U. S. 872 (1957).

The action was transferred to the United States District Court for the Northern District of Illinois and was assigned to the calendar of the petitioner. Thereupon, the respondents moved the petitioner to return the action to

Texas solely on the grounds that the Texas court lacked authority to transfer it and that the Illinois court lacked authority to accept it. The petitioner did not deem himself bound by the decision of the Fifth Circuit. Instead, he considered the question of jurisdiction *de novo* and, in an oral opinion (App. p. 1a), denied the respondents' motion. The respondents then petitioned the United States Court of Appeals for the Seventh Circuit for a writ of mandamus to compel the return of the action to Texas. Again, the respondents contended that the Northern District of Illinois was not a district where the action "might have been brought" and that the Texas court lacked statutory authority to transfer the action. In addition, the respondents contended that the Illinois court lacked jurisdiction to accept the transferred action. However, the respondents' petition was denied on July 1, 1958. The respondents then petitioned for a rehearing. The petition was granted, and, without re-argument, the original judgment was vacated and the writ of mandamus was issued on October 16, 1958, one judge dissenting (App. p. 15a). The court held that:

> "If when a suit is commenced, plaintiff has a right to sue in that district, independently of the wishes of defendant, it is a district 'where it might have been brought.' If he does not have that right, independently of the wishes of defendant, it is not a district 'where it might have been brought,' and it is immaterial that the defendant subsequently acquiesces." (App. p. 21a.)

The petitioner then moved for a rehearing *in banc*, but the motion was denied on November 25, 1958, two judges dissenting (App. p. 35a).

It may be noted that the identical issues involved herein are presented in the case of *Behimer et al.* v. *Sullivan, U. S. District Judge*, Appeal No. 12356, C. A. 7, not yet

officially reported. We are assured by counsel that a petition for writ of certiorari in that case will be filed within a few days.

REASONS FOR GRANTING THE WRIT.

The writ of certiorari should be granted for the following reasons: (1) The United States Court of Appeals for the Seventh Circuit has rendered a decision in conflict with the decisions of four other courts of appeals on the same matter; (2) The United States Court of Appeals for the Seventh Circuit has rendered a decision which is in conflict with the decision of another court of appeals *in the same case;* (3) The United States Court of Appeals for the Seventh Circuit has erroneously decided an important question of federal law which has not been, but should be, settled by this Court to effect the orderly administration of justice.

(1) The United States Court of Appeals for the Seventh Circuit has rendered a decision in conflict with the decisions of four other courts of appeals on the same matter: *Ex Parte Blaski*, 245 F. 2d 737 (5th Cir. 1957), cert. denied, 355 U. S. 872 (1957); *Torres* v. *Walsh*, 221 F. 2d 319 (2d Cir. 1955), cert. denied, 350 U. S. 836 (1955); *In Re Josephson*, 218 F. 2d 174 (1st Cir. 1954); *Anthony* v. *Kaufman*, 193 F. 2d 85 (2d Cir. 1951), cert. denied, 342 U. S. 955 (1952); and *Paramount Pictures Inc.* v. *Rodney*, 186 F. 2d 111 (3rd Cir. 1951), cert. denied, 340 U. S. 953 (1951). In the instant case, the court expressly recognized that a conflict existed:

> "Notwithstanding that some points of distinction may be drawn between the cited cases (except *Blaski*) and the instant case, it is fair to state that all of these cases contain language which in one way or another supports the power of the Texas Court in the instant matter." (App. p. 23a.)

The *Blaski* case, *supra*, has already been discussed. In the *Torres* case, *supra*, the court affirmed the transfer of an admiralty action from New York to Puerto Rico. The court noted that it was the respondent who sought the transfer; that there was no problem as to venue because the respondent agreed to appear in Puerto Rico; and that, consequently, the District of Puerto Rico was a district in which the action "might have been brought." The *Josephson* case, *supra*, involved a shareholder's derivative action which was instituted in Massachusetts and, on motion of the defendants, was transferred to New Mexico where venue was proper, but where service of process could not be had. However, the defendants agreed to appear in New Mexico. In upholding the transfer, the court stated that the transferee district was one in which the action "might have been brought" in view of the consent of the defendants. Further, the court specifically approved of those cases in which it was held that a transfer was proper even though the transferee district would not have had *venue* if the action had been instituted there and the defendant duly objected. In the *Anthony* case, *supra*, *both* defendants moved to transfer the action from New York to California where venue and personal jurisdiction were proper as to one defendant only. The action was transferred, and it was held that, since both defendants sought the transfer, the transferee district was one in which the action "might have been brought". In the *Paramount* case, *supra*, all defendants moved to transfer the action from Delaware to Texas where all of the defendants were amenable to service of process, but where venue was improper as to five defendants. The trial court determined that it did not have jurisdiction to transfer the action, and the defendants sought a writ of mandamus. It was held that, by joining in the motion to transfer, the five defendants waived their objection to venue in Texas; that the proposed

transferee district was one in which the action "might have been brought"; and that the trial court had jurisdiction to transfer the action.

The instant case is directly contrary to the decisions discussed in the preceding paragraph. The writ of certiorari should be granted to resolve this conflict.

(2) The United States Court of Appeals for the Seventh Circuit has rendered a decision which is in conflict with the decision of another court of appeals *in the same case*. *Ex Parte Blaski*, 245 F. 2d 737 (5th Cir. 1957), cert. denied, 355 U. S. 872 (1957). If the instant case is not reviewed by this Court, the action will be returned to the United States District Court for the Northern District of Texas. What will happen thereafter is a matter of conjecture. However, it is probable that the Clerk of that court will, in accordance with the *Blaski* decision, refuse to accept the action and will again send it to the United States District Court for the Northern District of Illinois, whence it will again be returned to Texas. Such circuity of action can be avoided only by a review of the decision in question.

(3) The United States Court of Appeals for the Seventh Circuit has erroneously decided an important question of federal law which has not been, but should be, settled by this Court to effect the orderly administration of justice. The question herein presented is one of importance to federal courts; it arises frequently. See, for example, in addition to the cases discussed above, the following cases in which the question arose: *Gilpin* v. *Wilson*, 148 F. Supp. 493 (M. D. Ala. 1957); *Hill* v. *Upper Mississippi Towing Corp.*, 141 F. Supp. 692 (D. Minn. 1956); *Mitchell* v. *Gundlach*, 136 F. Supp. 169 (D. Md. 1955); *General Electric Co.* v. *Central Transit Warehouse*, 127 F. Supp. 817 (W. D. Mo. 1955); *Cain* v. *Bowater's Newfoundland Pulp and Paper Mills, Ltd.*, 127 F. Supp. 949 (E. D. Pa. 1954);

Johnson v. *Harris*, 112 F. Supp. 338 (E. D. Tenn. 1953); *Hampton Theatres* v. *Paramount, etc.*, 90 F. Supp. 645 (D. D. C. 1950). Further, the question herein presented has been a subject of discussion and diverse opinion in treatises and numerous legal periodicals. See Moore, *Federal Rules and Official Forms*, p. 69 (1956); Kaufman, *Further Observations on Transfers Under Section 1404(a)*, 56 Col. L. Rev. 1 (1956); Note, 44 Cal. L. Rev. 792 (1956); Note, 8 Stanf. L. Rev. 338 (1956); Note, 68 Harv. L. Rev. 1467 (1955); Keeffe, *Venue and Removal Jokers in the New Federal Judicial Code*, 38 Va. L. Rev. 569 (1952); Note, 64 Harv. L. Rev. 1347 (1951); Note, 50 Mich. L. Rev. 347 (1951); Note, 60 Yale L. J. 183 (1951); Note, 30 Tex. L. Rev. 256 (1951); Note, 35 Cornell L. Q. 459 (1950); Braucher, *The Inconvenient Federal Forum*, 60 Harv. L. Rev. 908 (1947) (discussing the proposed revision of the judicial code); and Note, 60 Harv. L. Rev. 424 (1947) (also discussing the proposed revision of the judicial code).

The legislative history of 28 U. S. C. § 1404(a) before its adoption affords no definite basis for interpretation of the section and, in particular, of the phrase "where it might have been brought." After the adoption of section 1404(a), however, and during the progress of the *Rodney* case and after its disposition, some thirteen bills were submitted in Congress to limit this section. All of the bills were identical in scope. The first eleven were reviewed by the Judicial Conference which reported unanimously on March 12, 1951, as follows:

> "In the 81st Congress, bills * * * which died with the expiration of that Congress, were introduced as follows: * * * H. R. 7550 and at least 10 other similar bills (H. R. 7585, 7636, 7640, 7642, 7841, 7844, 7868, 7885, 7893, and 8019) proposing to add to section 1404 of title 28 of the United States Code of a new subsection to limit the power to transfer actions from

one district or division to any other in which it might have been brought.

Your Committee has given consideration to four questions: * * *

(4) Should section 1404(a) of the revised code, relating to transfers, be repealed or amended? * * *

Wherefore, your Committee recommends—* * *

(4) That no change of the nature now proposed be made in section 1404 of the Judicial Code and that bills to accomplish such change be disapproved." *

These recommendations were presented to and approved by the Judicial Conference at its September 1951 meeting.

The reports and recommendations are reported in Report 1706 of the House of Representatives 85th Congress, 2nd Session, particularly pages 14, 21 and 27-29.

Accordingly, it is both logical and proper to interpret the section to facilitate the transfer of actions where transfer is warranted by convenience and the interest of justice. This purpose is effectuated by the *Blaski, Torres, Josephson, Anthony* and *Paramount* cases. It is frustrated by the instant case. Unless it is reviewed, this decision, taken together with the general venue statute, 28 U. S. C. § 1391, will unduly restrict transfer and impede the expeditious and orderly administration of justice.

Prior to the instant decision and the decisions of some district courts, it was well settled that a defendant could waive any objection to venue or personal jurisdiction.

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* These bills sought to amend section 1404(a) by adding the following:

"(d) The preceding provisions of this section shall not apply to any civil action brought under any Act of Congress which vests in the plaintiff a choice of forum in which to bring suit and does not provide any authority for the transfer of the same to any other district or division."

This rule was in part codified in 28 U. S. C. § 1406(b) which provides that:

> "Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue."

The instant case derogates from this salutary rule by refusing to give effect to the defendants' *express* waiver of their objections to venue and personal jurisdiction in the transferee district.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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APPENDIX.

Transcript of Proceedings of March 14, 1958 before the Honorable Julius J. Hoffman, U. S. District Judge for the U. S. District Court, Northern District of Illinois, Eastern Division.

The Clerk: 58 C 127. John F. Blaski, *et al. versus* R. P. Howell, Jr., and Lifetime Metal Building Company.

The Court: I think I might run through this very fast. This is a motion to retransfer this cause to the Northern District of Texas. It came to me from Judge Perry's calendar, because of the fact the patent involved was the same as was involved in the other three cases which have gone to Judge Miner.

It appears that the plaintiffs here are residents of the Northern District of Illinois and that the defendants are residents of Texas. The plaintiffs assert that none of the defendants resides or does business in the Northern District of Illinois. The plaintiffs instituted an action for patent infringement in the Northern District of Texas. It is asserted by the plaintiffs that the acts of infringement occurred in the Northern District of Texas and that no acts of infringement occurred in the Northern District of Illinois. As far as I can tell, the defendants have not contested these assertions as to location, and I assume their truth for the purpose of deciding this motion.

Pursuant to 28 USC Section 1404 (a), the defendants moved to transfer the Texas action to the Northern District of Illinois. The trial court granted the motion and upon appeal by the plaintiffs in the form of mandamus the Fifth Circuit affirmed. The Supreme Court denied certiorari. *Ex parte Blaski*, 245 F. 2d 737 (Fifth Circuit,

1957), *certiorari denied* 355 U. S. 872 (1957). Accordingly the action was brought here.

Now, asserting that the Texas court lacked jurisdiction to transfer the action to Illinois, the plaintiffs moved to transfer the action back to Texas, and in connection with that motion, I refer to the section of the statute with which we are all familiar, but for the record, I will read it:

28 USC Section 1404 (a):

> "For the convenience of the parties and witnesses in the interest of justice a District Court may transfer any civil action to any other district or division where it might have been brought."

28 USC 1400 (b) sets forth the venue requirement in cases of patent infringement:

> "Any civil action for patent infringement may be brought in the judicial district where the defendant resides or where the defendant has committed acts of infringement and has a regular and established place of business."

If the plaintiffs had instituted action in this district, the defendant could have asserted correctly that venue was improper. We cannot find any relevant code provision pertaining to service of process in patent cases. Therefore I conclude that this case is governed by the general provision of Rule 4(f) of the Federal Rules of Civil Procedure, entitled "Territorial limits of effective service."

> "All process other than a subpoena may be served anywhere within the territorial limits of the state in which the District Court is held."

Although the plaintiffs have not so specifically alleged, it appears from the uncontradicted assertions of the plaintiffs that service of process upon the defendants could not be had in this district.

The plaintiffs in their brief assert that this district is

not one in which the action might have been brought, using the words of 1404(a); that the Texas Court lacked jurisdiction to transfer this action; that this court may inquire into the jurisdiction of the Texas Court and that this court must remand the action to Texas.

The defendants assert that the jurisdiction of the transferor court has already been determined by the Fifth Circuit and that the issue is therefore *res judicata*, and that if this court were to remand, the Texas court would refuse to accept the case. Initially, it must be determined whether this court may inquire into the jurisdiction of the Texas Court to transfer the action. I am of the opinion that this court may so inquire and that the doctrine of *res judicata* and the law of the case raise no barrier to such inquiry.

Absent 1404(a) a District Court would have no authority to transfer an action to another district, nor would a district court have authority to accept such a transfer.

Section 1404(a) was enacted to provide such authority or jurisdiction. Consequently the inquiry is one pertaining to jurisdiction of the Texas court to transfer the action. *Foster-Milburn* v. *Knight*, 181 F. 2d 949 (Second Circuit, 1950); and to the jurisdiction of this court to accept the transfer, *Fettig Canning Co.* v. *Steckler*, 188 F. 2d 715 (Seventh Circuit). The transferee court must inquire into the jurisdiction of the transferor court.

United States v. *Reid*, 104 F. Supp. 260 (E. D. Arkansas, 1952).

Wilson v. *Kansas City Southern Railway Company*, 101 F. Supp. 56 (Western District of Missouri, 1951).

A transferee court must inquire into its own jurisdiction to accept the transfer.

Fettig v. *Steckler* which I mentioned before.

If either court lacks jurisdiction, the transferee court must remand the case to the transferor court.

Again I refer to the *Fettig* case and the *Reid* case, in that connection, and also the *Wilson* case.

The action of the transferee court is reviewable by mandamus. The *Fettig* case was a mandamus case involving Judge Steckler of Indianapolis.

The doctrine of *res judicata* and the law of the case, as I said a moment ago, cannot be imposed to remedy defects in jurisdiction.

That was said in the *Reid* case. Consequently I must determine whether the Texas court had jurisdiction to transfer this case. I think the Texas court had jurisdiction to transfer the action to any other district where it might have been brought. So essentially the question relates to statutory interpretation in ascertaining the meaning of the phrase "Where it might have been brought."

First, we consider the practice prior to the enactment of 1404(a). At common law a Federal district court, applying the doctrine of *forum non conveniens* could properly dismiss an action without prejudice if there existed another more convenient district in which the plaintiff could reinstitute his action. The doctrine presupposed two forums in which the defendants were amenable to service.

> *Gulf Oil Company* v. *Gilbert*, 330 U. S. 501 at 507 (1946).

Since it appears that the defendants are not amenable to process in Illinois, the doctrine of *forum non conveniens* could not have been applied in the case at bar.

Thus the ultimate issue presented by this motion is whether the same result must obtain under 1404(a) in the light of the phrase "Where it might have been brought."

The reviser's note to 1404(a) says this:

> "Subsection (a) was drafted in conformity with the doctrine of *forum non conveniens*."

Accordingly, early cases interpreting the section stated that the section merely codified the common law doctrine.

> Kaufman, Observations on Transfers, Section 1404(a).
>
> 10 FRD 595 at 598 (1951).

That is Judge Kaufman of the Southern District of New York.

More recent cases have expressed the view that 1404(a) constituted a substantial revision of the doctrine. *Norwood* v. *Kirkpatrick*, 349 U. S. 29 (1955).

Again I refer you to another article by Judge Kaufman, Further Observations on Transfers, under Section 1404(a) which he wrote for the Columbia Law Review.

> 56 Columbia Law Review, Page 1 (1956).

Although it may be accepted now that 1404(a) is broader in scope than the pre-existing practice, that fact alone does not resolve the question whether 1404(a) presupposes a transferee jurisdiction in which the defendant is amenable to service of process and in which venue is proper. Those cases which assert that 1404(a) transcends the common law doctrine do not deal with this question.

There is no legislative history of reasonable applicability to the question. Accordingly, recourse must be had to the decided cases.

Four Circuits have considered the question and their decisions stand, I think, for the proposition that where the defendant moves to transfer an action to a district in which venue would be improper and/or the defendant would not be amenable to service of process, a waiver of these defects

is effected. And the court has jurisdiction to transfer the action. The Supreme Court has denied certiorari in three cases in which certiorari was sought.

Ex parte Blaski, who is our friend Blaski in these cases; *In re Josephson*, 218 F. 2d 174 (First Circuit, 1954).

Anthony v. *Kaufman*, 193 F. 2d 85 (Second Circuit, 1951).

Certiorari denied, 342 U. S. 955 (1952).

Paramount Pictures v. *Rodney*, 186 F. 2d 111 (Third Circuit, 1951).

Certiorari denied, 340 U. S. 953 (1951).

Accord: *General Casualty Company* v. *Keller*, 154 Federal Supplement 45. Eastern District of Wisconsin, 1957, and other district court cases which I do not now have before me.

Neither the Seventh Circuit nor the Northern District has been confronted with the question. In opposition to the cases cited above, other cases support the proposition that the district in which an action might have been brought is one in which venue and amenability to service of process exists apart from any consideration of waiver.

Shapiro v. *The Bonanza Hotel Co.*, 185 F. 2d 707 (Ninth Circuit, 1950).

General Electric Company v. *Central Transit Warehouse*, 127 Fed. Supp. 817 (Western District of Missouri, 1955); *Johnson* v. *Harris*, 112 F. Supp. 338 (Eastern District of Tennessee, 1953); *Hampton Theatres* v. *Paramount*, 90 F. Supp. 645 (D. D. C. 1950) and I suggest looking at the dissenting opinions in the *Paramount* v. *Rodney* case to which I referred a moment ago.

The leading case in support of transfer is the *Rodney* case. There action was instituted in Delaware under the

Clayton Act. All 14 defendants moved to transfer to Texas. Although by statute service of process was nationwide in Clayton Act cases, venue in Texas was improper as to five defendants. The trial court determined that it had no jurisdiction to transfer. The defendants sought mandamus, and it was held that the trial court did have jurisdiction. The problem was treated simply as one of waiver of venue. At pages 114 and 115, it is said:

> "Suits embracing the identical subject matter could have been brought against the defendants in any district court in Texas. Moreover, if brought, these suits could have been maintained unless there had been a seasonable objection to the venue by the defendant.
>
> "Even if the doctrine of *forum non conveniens* had been applied under the precise conditions required by the *Gulf Oil Company* v. *Gilbert*, those conditions are met by the instant circumstances, that is to say the Texas Court would have had the power to adjudicate the controversies and would have had jurisdiction of all defendants.
>
> "By joining in the motion to transfer, the defendants have waived any objection to Texas venue and have agreed to submit themselves to a Texas court. We think that consent is to be given the same effect under Section 1404(a) as it would receive under any other venue statute."

That is the end of that quotation.

Although there was no problem of service of process in the *Paramount* v. *Rodney* case as there is in the case with which we are concerned, the argument of waiver applies with equal vigor to the service of process. Service of process is an element of jurisdiction over the person, which jurisdiction can be waived.

In *Anthony* v. *Kaufman* to which I have alluded before, the plaintiff sued two defendants in New York. Both defendants moved to transfer to California. One of the two

defendants was not amenable to service of process in California. The trial court transferred the action. Reviewing the decision of the trial court, Judge Frank stated, 193 F. 2d at 86:

> "But here one defendant could have been served in the transferee district while the other defendant which could not have been served has joined in the application for and thus consented to the transfer. That consent is a waiver of lack of venue. If such waiver existed before the plaintiff commenced the suit, it could have been brought there. We think 28 USC 1404 covers such a case."

In the *Josephson* case to which I have referred there was involved a shareholder's derivative action which was instituted in Massachusetts. The defendant moved to transfer the action to New Mexico where venue was proper but where service of process could not be had. The action was transferred, and the first circuit affirmed. Although the decision rested in large part upon the fact that venue was proper in New Mexico, Chief Judge McGruder specifically approved the *Paramount* and *Anthony* cases in a lengthy dictum. With reference to the problem of the service of process, it was stated at page 186, that is reported in 212 F. 2d,

> "they were already subject to the personal jurisdiction of the United States District Court for the District of Massachusetts by service of process upon them, and this personal jurisdiction was transferred to the United States District Court for the District of New Mexico by the effect of the transfer order."

The three cases which I have just discussed were cited with approval and followed by the Fifth Circuit in *Ex parte Blaski*. That the Fifth Circuit was disposed toward a liberal interpretation of 1404(a) was evidenced by the following quotation:

> "The purposes for which 1404(a) was enacted would

> be unduly circumscribed if a transfer could not be made in the interest of justice to a district where the defendants not only waived venue, but to which they seek the transfer."

That is page 738, 245 F. 2d.

Many district court decisions are in accord with these cases. The plaintiffs' brief I observe makes no mention of these cases. Perhaps they would appear in some additional brief and I allowed one to be filed.

Now, as to cases rejecting the transfer to the Northern District of Illinois, as we all know a penetrating analysis of the problem is contained in the dissenting opinion in *Paramount* v. *Rodney*. Judges Hastie and McLaughlin noted that Congress had made specific provision for venue. In many cases venue may exist in several districts. In their opinion it was logical to permit transfer only to those districts in which statutory venue existed.

At 186 F. 2d 117, it was said:

> "It seems to us that in rejecting the specific venue provision governing actions under the Clayton Act as definitive of the limits of power to transfer suits under Section 1404(a) this court is holding that the latter statute empowers the District Court to transfer litigation to any district whatever if the court deems such action is just and convenient. In brief, the Court is holding that the concluding phrase in Section 1404(a), 'Where it might have been brought,' is surplusage."

In answer to the argument that a liberal construction of 1404(a) was to be preferred to further the ends of justice and convenience, it was said at page 118:

> "Whatever merit there may be in the matter of policy in the view implicit in the opinion of the court that a district court should be free to transfer cases according to justice and convenience without technical restrictions, we think Congress has not expressed or

> embodied that policy in Section 1404(a). If such had been the intention of Congress we think the concluding phrase of Section 1404(a) would have been omitted, but that phrase was included and we should give it substantial effect according to its tenor."

In answering the argument that the concluding phrase of 1404(a) should be interpreted in the light of the rule that defects of venue may be waived, it was said at page 119:

> "But we do not see how the conduct of a defendant after suit has been instituted can add to the forums where 'it might have been brought'. In the normal meaning of words, this language in Section 1404(a) directs the attention of the judge who is considering the transfer to the situation which existed when the suit was instituted."

In *Shapiro* v. *Bonanza Hotel Co.*, 185 F. 2d 777, coming out of the Ninth Circuit, 1950, the phrase "might have been brought" was interpreted to exclude those districts in which the defendant was not amenable to service of process. However, it is to be noted that plaintiff was the movant and the defendant had not, expressly or by implication, waived service of process.

In *United States against Reid*, to which I have referred before, the transferee court remanded to the transferor court because service of process could not have been had in the transferee's jurisdiction. However, again the plaintiff was the movant.

In *Johnson versus Harris*, the district court denied the defendant's motion to transfer, asserting without citation of authorities that statutory venue must exist in the transferee jurisdiction. In *Hampton Theatre against Paramount* to which we have referred, a similar conclusion was reached, again without citation of authorities. In a lengthy dictum in *General Electric Company versus Central Transit Warehouse*, to which we have previously referred, the district

judge, now Mr. Justice Whitaker, expressly declined to follow *Paramount against Rodney*, and *Anthony against Kaufman* in a case in which the defendant was the movant for transfer.

Judge Whitaker relied *in toto* upon the reasoning of the dissenter in *Paramount against Rodney*.

Those cases which support the transfer of the case at bar to Illinois are approved in Moore, Federal Rules and Official Forms, page 69, 1956, and Kaufman, Further Observations on Transfers, under Section 1404(a). That is the Columbia Law Review article to which I have previously referred. The plaintiff relies on those cases cited in Section 3 of its memorandum which I am not reading.

In addition, the plaintiff relies upon *Wilson versus Kansas City Southern Railway*, 101 Fed. Supp. 56 (Western District of Missouri, 1951). *Felchlin versus American Smelting*, 136 Fed. Supp. 577 (Southern District of California, 1955).

The *Fettig* case, *Christopher against American News Company*, 176 F. 2d 11, a Seventh Circuit case decided in 1949.

Chicago, Rock Island and Pacific Railroad versus Igoe, 212 F. 2d 378 (Seventh Circuit, 1954).

In my view, the *Wilson* case is not in point. There the transferee court determined that the transferor court lacked jurisdiction over the person of the defendant. Accordingly the transferee court could not accept the case. It is my view also that the *Felchlin* case is not in point. There the transferee court determined in a diversity case that the law of the transferee state would not permit the plaintiff, a California executor, to maintain the action.

The *Fettig* case is not in point in my view. There an action *in rem* for condemnation of food was instituted in

Missouri. The *res* was before the Missouri District Court. By consent the action was transferred to Indiana. However, the *res* was not transferred. Accordingly it was determined that the transferee court lacked jurisdiction over the subject matter of the action.

In the *Christopher* case the defendant moved to transfer an action to New York asserting that companion cases were pending there. In a *per curiam* decision upholding the transfer the Seventh Circuit noted it was unlikely that the New York action could be transferred to Chicago because certain of the New York defendants could not be served in this district. The court's quotation relied upon by the plaintiff in the case at bar was dictum and I think vague, and I believe completely without authoritative value.

In the *Igoe* case the court was concerned only with its own power to review by mandamus the decision of the district court.

In referring to 1404(a), the court by way of dictum for no apparent reason asserted:

> "This section presuppeses two jurisdictions in which venue may be based. *Foster-Milburn Company versus Knight* (Second Circuit), 181 F. 2d 949."

In the cited case the Second Circuit held that upon motion by the plaintiff an action could not be transferred to a jurisdiction in which the defendant was not amenable to service of process. The Second Circuit reaches an opposite conclusion, where the defendant is the movant.

I refer you in that connection again to *Anthony* v. *Kaufman*.

Gentlemen, personally I am of the opinion that the dissent in *Paramount against Rodney* is supported by the greater weight of reason and logic and that this Court, if I were to rely on my own personal inclination, should retransfer this case to Texas.

Those cases supporting transfer to this district, I think, do great violence to the established rules of statutory construction.

They seem to create a doctrine of retroactive waiver in order to reach the conclusion that the action might have been brought. I feel, however, I must follow the law as it appears to me to be established, especially in view of the fact that the Supreme Court has consistently refused to grant certiorari to those cases supporting transfer to this district.

Accordingly, I deny the plaintiff's motion.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 12285. September Term, 1957, April Session, 1958.

JOHN F. BLASKI, *et al.*, *Petitioners*,
vs.
HONORABLE JULIUS J. HOFFMAN, United States District Judge, *Respondent*.

Original Petition for Writ of Mandamus.

July 1, 1958.

OPINION.*

Before MAJOR, FINNEGAN and SCHNACKENBERG, *Circuit Judges*.

FINNEGAN, *Circuit Judge*. *Ex Parte Blaski*, 245 F. 2d 737 (5th Cir. 1957) is the opinion of the Fifth Circuit denying Blaski, et al., leave to file a petition for a writ of mandamus as a device for vacating an order of transfer from the Northern District of Texas to the Northern District of Illinois. After this case arrived in the United States District Court, Chicago, Illinois, the Texas plaintiffs (petitioners in our court) invoking 28 U. S. C. §1404(a), asked

* The Clerk of the United States Court of Appeals for the Seventh Circuit was requested to include this Opinion in the Certified Record but refused to do so on the basis of the Opinion of the Court, dated October 16, 1958, which withdrew this Opinion and set aside and vacated all orders entered pursuant thereto.

the respondent district judge to transfer the cause back to Texas. He denied plaintiff's motion and this mandamus petition followed. The *Blaski* opinion, just cited, adequately states the facts and petitioners' arguments in our court add nothing substantial — legally or factually. There appears to be no legalistic reason just why the respondent district judge should overrule the Fifth Circuit and we think petitioners fail in making any showing that judicial discretion has been abused. *General Casualty Company of America* v. *Grubb*, ... F. 2d ..... (7th Cir. 1958).

The petition for writ of mandamus is

DENIED.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 12285 September Term and Session, 1958

JOHN F. BLASKI et al., *Petitioners*,

vs.

HONORABLE JULIUS J. HOFFMAN, United States District Judge, *Respondent*.

Petition for Writ of Mandamus on Petition for Rehearing.

October 16, 1958.

OPINION.

Before MAJOR, FINNEGAN and SCHNACKENBERG, *Circuit Judges*.

MAJOR, *Circuit Judge*. This Court, on July 1, 1958, rendered an opinion denying petitioners' petition for a writ of mandamus. Upon petition for rehearing, it is ordered that such opinion be withdrawn and that all orders entered pursuant thereto be vacated and set aside.

The facts which give rise to the legal issue for decision are not in dispute. Petitioners, as plaintiffs, on March 1, 1957 filed in the United States District Court, Northern District of Texas, Dallas Division (hereinafter referred to as the Texas Court or District), a complaint charging R. P. Howell, Jr. and Lifetime Metal Building Company with patent infringement. Plaintiffs reside or are doing business within the Northern District of Illinois (herein-

after referred to as the Illinois District). The complaint alleged acts of infringement committed by defendants in the Texas District, and no acts of infringement, so far as known, committed by either of the defendants in the Illinois District. Service of process was had upon defendants in the Texas District. Defendants answered the complaint and the case was set for trial.

In the meantime, defendants submitted a motion requesting transfer of the action to the Illinois District, under Title 28 U. S. C. A. Sec. 1404 (a), stating in their motion that defendants waived lack of venue in the Illinois District. Over objection of plaintiffs (petitioners here), the Texas Court directed that, for the convenience of the parties and witnesses and in the interest of justice, the action be transferred to the Illinois District.

Plaintiffs, after denial of their motion to vacate the order of transfer, filed a petition for writ of mandamus in the United States Court of Appeals for the Fifth Circuit, requesting that Court to issue an order to show cause why a writ of mandamus should not be issued against the Texas District Judge, nullifying the transfer order. The Court of Appeals (5 Cir.) held that the District Court was empowered by statute to make the transfer, and denied leave to file the petition. *Ex Parte Blaski et al.*, 245 F. 2d 737.

The papers and records in the Texas District infringement action were received in the Clerk's Office of the Illinois District pursuant to the transfer order. Thereupon, petitioners filed a motion in the Illinois District for an order directing the transfer of and remandment of the action to the Texas District, on the ground that the Texas Court was without power to order the transfer and, consequently, the Illinois Court did not acquire jurisdiction. A hearing on the petition and response thereto was had before Honorable Julius J. Hoffman, a Judge

of the Illinois District and respondent in the instant proceeding. Respondent, on March 14, 1958, entered an order denying petitioners' motion, and in an oral opinion stated his reasons therefor. Thereupon, petitioners filed in this Court the petition now before us for a writ of mandamus directing respondent to order such transfer and remand.

No question is raised, in fact all parties concede that under Sec. 1651 (a), Title 28, U. S. C. A., mandamus is an appropriate means for testing the legality of the order in controversy. Furthermore, our jurisdiction, if there be any doubt, is supported by the decision of this Court in *Chicago, R. I. & P. R. Co.* v. *Igoe*, 212 F. 2d 378.

The questions for decision appear to be correctly stated in petitioners' brief, and are as follows:

> "(1) Whether a district court, having proper venue and jurisdiction over defendants in a patent infringement action, has the power under Section 1404 (a), Title 28, U. S. C. A. to transfer the cause of action, on motion of the defendants and over the objections of the plaintiffs, to a district in which venue is not proper; and
>
> "(2) Whether, under such circumstances, the transferee court acquires jurisdiction, or has the power to accept such a transfer."

Two statutory provisions are pertinent: Secs. 1400 (b) and 1404 (a), Title 28 U. S. C. A. Section 1400 (b), a venue provision, specifically applicable to actions for patent infringement, provides:

> "Any civil action for patent infringement *may be brought* in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business. [Italics supplied.]"

Section 1404 (a), relating to change of venue, provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division *where it might have been brought.* [Italics supplied.]"

It is not open to doubt but that petitioners' action was properly brought in the Texas District, where defendants not only resided but where the acts of infringement took place and where defendants had their regular and established place of business. It appears plain, also, that venue could not properly have been laid in the Illinois District. A solution of the problem before us reduces itself to the legal effect to be given the concluding phrase of Sec. 1404 (a), "where it might have been brought." Does that phrase refer to the district where such an action "may be brought" under Sec. 1400 (b)? If the question was of first impression, we would have no hesitancy in answering in the affirmative. It is a contradiction of terms and does violence to the plain, unambiguous language which Congress has employed, to reason that the Texas Court, with power to transfer the action only to a district "where it might have been brought," could exercise that power by ordering transfer to a district which it could not have been brought.

If the Texas District had the power on motion of defendants to transfer the action to the Illinois District, it likewise had the power on a similar motion to transfer it to any District Court in the United States. Counsel for respondent argues that the Illinois District was one where the action "might have been brought" because it had general jurisdiction of an action for patent infringement and acquired jurisdiction of defendants by their motion to transfer and their consent to trial in the Illinois District. Precisely the same argument could be made in support of the power of the Texas District if transfer

had been made to any other District Court in the United States. Counsel's argument, if accepted, renders the phrase "where it might have been brought" meaningless. The transfer provision would be complete absent the phrase of limitation. This phrase, however, cannot be ignored under the guise of statutory construction; to do so amounts to statutory emasculation.

It must be clearly kept in mind that there is no issue of discretion involved in the instant matter either on the part of the Texas District Judge in ordering the transfer or on the part of the respondent in refusing to remand it. The sole issue is that of power on the part of one to transfer, on the part of the other to accept and entertain jurisdiction. Also, the general rule should not be overlooked that a Federal Court has only such jurisdiction or power as Congress has specifically conferred. The venue where a patent infringement action may be brought, as well as the district to which it may be subsequently transferred, has been clearly delineated by Congress.

When Congress provided for transfer to a district "where it might have been brought," it is hardly open to doubt but that it referred to a district where the plaintiff, in a case sought to be transferred, had a right to bring the case. Under the decisions of the Supreme Court and other courts, the action could have been properly brought only in the district (1) where defendant resides or (2) where defendant has committed acts of infringement and has a regular and established place of business. Under the admitted facts, the action could have been properly brought only in the Texas District. Conversely, it could not have been properly brought in the Illinois District.

In *Stonite Products Co.* v. *Melvin Lloyd Co., et al.*, 315 U. S. 561, the question for determination was whether Sec. 48 of the Judicial Code (Title 28 U. S. C. A. Sec. 109) was

the sole provision governing venue of patent litigation. Referring to that section, the Court stated (page 562):

> "Section 48 gives jurisdiction of suits for patent infringement to the United States district courts in the district of which the defendant is an inhabitant, or in any district in which the defendant shall have committed acts of infringement and have a regular and established place of business."

On the following page the Court stated:

> "We hold that Section 48 is the exclusive provision controlling venue in patent infringement proceedings."

Section 48, before the Court in Stonite, was the predecessor venue provision to Sec. 1400 (b) of the present Code. The holding in *Stonite*, however, is equally applicable to the present venue provision. *Fourco Glass Co.* v. *Transmirra Products Corp. et al.*, 353 U. S. 222. The Court in the latter case stated (page 228):

> "For it will be seen that Section 1400 (b) is equally clear and, also, that it deals specially and specifically with venue in patent infringement actions."

And again, on the following page:

> "We hold that 28 U. S. C. Sec. 1400 (b) is the sole and exclusive provision controlling venue in patent infringement actions * * *."

See also the recent opinion by Judge Mercer in *Gas Products Corp.* v. *George D. Roper Corp. et al.*, 147 F. Supp. 853.

When Congress provided for the transfer of a case to a district "where it might have been brought," it meant the district where plaintiff has a recognized right to bring his case under the Venue Act and that this right was unqualified and absolute, not depending upon consent of the defendant, evidence by waiver, entry of appearance, or otherwise. If when a suit is commenced, plaintiff has a

right to sue in that district, independently of the wishes of defendant, it is a district "where it might have been brought." If he does not have that right, independently of the wishes of defendant, it is not a district "where it might have been brought," and it is immaterial that the defendant subsequently acquiesces. The test is, did the plaintiff have an independent right to commence suit in the district to which it is sought to make transfer? If so, it is a district "where it might have been brought"; otherwise, it is not such a district. We recognize, of course, that venue may be waived under proper circumstances, but we do not think it can be waived in a forum in which an action has not and could not have been properly brought by the opposing party. To hold otherwise is to permit a defendant to select a forum not available to a plaintiff as a matter of right, and over plaintiff's objection.

Respondent in his brief states:

> "Petitioners fail to recognize the difference between jurisdiction of the subject matter and venue over the particular defendants. The District Court had jurisdiction of the subject matter at the time the original suit was brought by reason of the very nature of the suit, *i. e.*, patent infringement."

True, every District Court has jurisdiction over patent infringement litigation generally but the suggestion must be novel, certainly not sound, that the Illinois Court acquired jurisdiction of the subject matter of the instant action at the time it was brought in the Texas District. No court, so far as we are aware, in an action for patent infringement or any other, acquires jurisdiction either of the subject matter or of the parties until the action is properly brought in such court. Furthermore, it begs the question to suggest that the Illinois Court acquired jurisdiction via the transfer because that is dependent upon the issue for decision, that is, whether Congress has en-

dowed the transferring court with power to order the transfer. As shown, the action could not properly have been brought in the Illinois Court, and, therefore, it was not a district "where it might have been brought." Consequently, the Texas Court was without power to order the transfer and the Illinois Court acquired neither jurisdiction nor venue of the action.

Our conclusion is based upon what we think is a clear congressional mandate. In *Ex Parte Collett*, 337 U. S. 55, the Court held that the phrase "any civil action" found in Sec. 1404 (a) was applicable to an action under the Federal Employers' Liability Act. In so doing the Court stated (page 58):

> "The court below relied on the language of Sec. 1404 (a), *supra*, which it regarded as 'unambiguous, direct, clear.' We agree. The reach of 'any civil action' is unmistakable. The phrase is used without qualification, without hint that some should be excluded."

In our view, the phrase "where it might have been brought" contained in the same section is equally unambiguous, direct and clear.

Notwithstanding the emphatic view which we entertain, it must be conceded that a solution of the problem has engendered much controversy in the courts and that there is respectable opposing authority, although upon analysis it is not as imposing as counsel would have us believe. An attempt to distinguish or analyze such cases in detail would unduly prolong this discussion. A reading of all the cases where the question has been considered leads to the view that the weight of authority sustains our conclusion in the matter.

Respondent asserts that four Courts of Appeals have sustained the power of the court to transfer under the circumstances of the instant case. *Ex Parte Blaski, et al.*,

245 F. 2d 737 (5 Cir.); *In Re Josephson*, 218 F. 2d 174 (1 Cir.); *Anthony* v. *Kaufman*, 193 F. 2d 85, and *Torres* v. *Walsh*, 221 F. 2d 319 (2 Cir.); *Paramount Pictures, Inc.* v. *Rodney*, 186 F. 2d 111 (3 Cir.). We regard *Blaski* as the most important of these cases because the Court refused to entertain a petition for mandamus directing the Texas District to vacate its order of transfer in the instant case. With great respect for that Court, we think its opinion discloses that it, like some other Courts, confused the issue of power to transfer with that of discretion where the power existed. In its opinion the Court stated (page 738):

> "The purposes for which Sec. 1404 (a) was enacted would be unduly circumscribed if a transfer could not be made 'in the interest of justice' to a district where the defendants not only waive venue but to which they seek the transfer."

This reasoning, so we think, ignores the statutory limitation of the power to transfer to a district "where it might have been brought." More than that, a court has no more right to unduly enlarge than it has to unduly circumscribe a limitation which Congress has specifically provided. In any event, we think the decision of the Fifth Circuit in this matter is erroneous. Such being the case, we are under no more obligation to follow it as the law of the case than that Circuit would be to follow what it considers an erroneous decision by this Court. See *Wilson* v. *Kansas City Southern Ry. Co., et al.*, 101 F. Supp. 56, 60.

In all the other cases above cited, except *Torres* v. *Walsh*, it appears that one or more of the defendants could have been sued in the district to which the action was transferred. Thus, the action "might have been properly brought" in such district. The *Torres* case involved an *in rem* proceeding in admiralty which presented a different situation as to venue and service. Notwithstand-

ing that some points of distinction may be drawn between the cited cases (except *Blaski*) and the instant case, it is fair to state that all of these cases contain language which in one way or another supports the power of the Texas Court in the instant matter.

The case most relied upon by respondent is *Paramount Pictures, Inc.* v. *Rodney*, 186 F. 2d 111. This case was decided by a court of five judges, two of whom dissented (Judges Hastie and McLaughlin). With due respect to the majority, we agree with the reasoning and logic of the dissenting opinion. The dissent states (page 119):

> "But we do not see how the conduct of a defendant after suit has been instituted can add to the forums where 'it might have been brought.' In the normal meaning of words this language of Section 1404 (a) directs the attention of the judge who is considering a transfer to the situation which existed when suit was instituted."

In agreeing with the dissenting members of that Court, we find ourselves in good company. In *General Electric Co.* v. *Central Transit Warehouse Co. et al.*, 127 F. Supp. 817, Judge Whittaker (then a District Judge, now a Justice of the Supreme Court) also agreed with the dissenting members in the *Paramount Pictures* case. More than that, he analyzed and distinguished that case on its facts. In our view, the opinion by Judge Whittaker is sound. His reasoning and logic is unassailable and we think he reached the correct result. A striking statement in his opinion, referring to the construction, there sought as it is here, of the phrase "where it might have been brought," is (page 826):

> "Would not such construction be to read that phrase entirely out of the statute? Would not such construction permit transfer of the action to *any district desired by the moving defendants*, though they, or some of them, could not have been served with process

there, and no statutory venue existed there, and the action could not have been maintained there, without their intentional waiver of venue and entry of general appearance? I think no such treatment can be given to that phrase in the statute. It, says Judge Learned Hand, " 'presupposes at least two forums in which the defendant is amenable to process.' " *Foster-Milburn Co.* v. *Knight*, 2 Cir., 181 F. 2d 949, 952."

We have read with interest Judge Hoffman's opinion. He makes a fair and detailed analysis of numerous cases. His counsel in this Court stated, "We, as counsel, cannot improve upon the discussion of the law on this subject which was included in Respondent's opinion." We agree that counsel have not improved upon Judge Hoffman's opinion. Among other things he stated:

"Gentlemen, personally I am of the opinion that the dissent in *Paramount* against *Rodney* is supported by the greater weight of reason and logic and that this Court, if I were to rely on my own personal inclination should retransfer this case to Texas.

"Those cases supporting transfer to this district, I think, do great violence to the established rules of statutory construction.

"They seem to create a doctrine of retroactive waiver in order to reach the conclusion that the action might have been brought."

After having thus reasoned, he concluded:

"I feel, however, I must follow the law as it appears to me to be established, especially in view of the fact that the Supreme Court has consistently refused to grant certiorari to those cases supporting transfer to this district."

It thus appears that respondent reasoned one way and decided the other. Certainly he had no sound basis for attaching weight to the fact that the Supreme Court has refused to grant certiorari in the cases supporting trans-

fer. See *Agoston* v. *Commonwealth of Pennsylvania*, 340 U. S. 844, 845.

We have heretofore quoted from Judge Whittaker's opinion in *General Electric Co.* v. *Central Transit Warehouse Co. et al.*, 127 F. Supp. 817, which includes a statement from *Foster-Milburn Co.* v. *Knight* (2 Cir.), 181 F. 2d 949, 952, that it (referring to Sec. 1404 (a)) "presupposes at least two forums in which the defendant is amenable to process." This Court, in *Chicago, R. I. and P. R. Co.* v. *Igoe*, 212 F. 2d 378, 379 (footnote), cited with approval the statement from the *Foster-Milburn* case. Numerous District Courts have embraced this view of the transfer section. *Nachtman* v. *Jones & Laughlin Steel Corp.*, 90 F. Supp. 739, 740; *Wilson* v. *K. C. Southern Ry. Co. et al.*, 101 F. Supp. 56; *Johnson* v. *Harris*, 112 F. Supp. 338, 341; *Mitchell* v. *Gundlach*, 136 F. Supp. 169, 172; *Felchlin* v. *American Smelting & Refining Co.*, 136 F. Supp. 577, 581; *Hill* v. *Upper Mississippi Towing Corp.*, 141 F. Supp. 692, 694; *Gilpin* v. *Wilson*, 148 F. Supp. 493.

In the last cited case, the latest which we find on the subject, the Court after reviewing the case law decided that the transferee district must be one where the action might have been originally brought. In so deciding, the Court stated (page 494):

> "The Court, while recognizing the divergence of authority on this question, is persuaded that a district wherein the action 'might have been brought' infers that the transferee district must be not only a district wherein venue lies and a complaint may be filed, as indeed one may file a complaint at will, but the transferee district must also be one in which the action might have been legally maintained and service of process effected upon the defendant. This view comprises the weight of authority and is represented by well-reasoned decisions from both the Second and Ninth Circuits."

(*Foster-Milburn Co.* v. *Knight*, 2 Cir., 181 F. 2d 949, and *Shapiro* v. *Bonanza Hotel Co.*, 9 Cir., 185 F. 2d 777.) The Court in *Gilpin* cites other cases which have expressed the same view, including *Blackmar* v. *Guerre et al.* (5 Cir.), 190 F. 2d 427, 429, wherein the Court stated:

> "Transfer under those sections [1404 (a) and 1406 (a)] is limited to districts where the suit could be originally brought. [Citing cases.]"

In *Ex Parte Collett*, 337 U. S. 55, the Court considered the doctrine of *forum non conveniens* as it relates to Sec. 1404 (a). In that connection, the Court discussed the transfer section together with the venue provision there involved. While the issue in the instant case was not directly involved, we think the reasoning by analogy supports the view that the transferee district must be one where the action could have been properly brought. (See pages 59 and 60.) Counsel for respondent attempt to escape the reasoning of *Collett* on the basis of *Norwood* v. *Kirkpatrick*, 349 U. S. 29, which is claimed broadened the scope to be awarded Sec. 1404 (a). The suggestion is without merit. *Norwood* had nothing to do with the statutory limitation on the power of a District Court to transfer. The case is concerned solely with the matter of the Court's discretion. The Court stated (page 32):

> "As a consequence, we believe that Congress, by the term 'for the convenience of parties and witnesses, in the interest of justice,' intended to permit courts to grant transfers upon a lesser showing of inconvenience. This is not to say that the relevant factors have changed or that the plaintiff's choice of forum is not to be considered, but only that the discretion to be exercised is broader."

For a discussion of the *Norwood* case see *Clayton* v. *Swift & Co.*, 137 F. Supp. 219, 221.

So that there will be no misunderstanding as to our

position on the power of a District Court to transfer an action to another district, we refer to a recent opinion of this Court. *General Casualty Co.* v. *Grubb*, 253 F. 2d 51. Unfortunately this case is sometimes cited in support of the thesis that a District Court has the power to transfer to a forum where the action could not have been originally brought. Whether the issue of power was before the Court in the *Grubb* case the opinion does not disclose. If so, it is evident that the issue was undecided. The case was decided solely on the issue of the District Court's discretion to order the transfer. As the Court stated (page 53):

> "On the other hand, we are appraising discretion exercised under Sec. 1404 by the district court and all we can do is to determine whether the respondent Judge abused it while at the same time, guarding against substituting our discretion for his."

The writ of mandamus is allowed, and respondent is directed to vacate and set aside his order entered March 14, 1958, and to order the action remanded to the United States District Court, Northern District of Texas, Dallas Division.

FINNEGAN, *Circuit Judge*, Dissenting. An opinion in this case, written by me, and in which Judge Major and Judge Schnackenberg joined with me, was handed down July 1, 1958. Now my two colleagues have changed their position, and on rehearing ordered withdrawal of our earlier unanimous opinion. Since I adhere to my original position of refusing the peremptory writ of mandamus in this case, I am explaining my reasons for dissenting.

At the outset, I underscore two items. (1) The record underlying this current majority opinion has remained unchanged since the day when we three judges handed

down our first *Blaski* opinion. (2) John F. Blaski, MPH Manufacturing Corporation, Inc., Peter S. Pedersen, Peter S. Pederson, Jr., co-partners d/b/a Central Farm Equipment Company, petitioners here, had earlier, October 3, 1955, sought a writ of mandamus in our Court to expunge Judge Tehan's order transferring their case brought in the Eastern District of Wisconsin against Inland Steel Products Company, LeRoy Hermann and Robert Anderson, defendants, from the Eastern District of Wisconsin to the Northern District of Illinois for consolidation with other suits then pending in the latter District Court. Those cases involve the same patent as the case at bar. Judge Schnackenberg joined with Judge Lindley in an order, entered October 3, 1955, denying the petition of Blaski, et al. for mandamus. The petition for a writ of mandamus in that case shows Blaski, et al. challenged the power of Judge Tehan to transfer, or in the alternative, claimed the District Judge abused his discretion.

Ex Parte Blaski, 245 F. 2d 737 (5th Cir. 1957) is the Fifth Circuit's opinion denying leave to file a petition for a writ of mandamus to vacate the order entered by the United States District Court in Texas transferring the case at bar to the Northern District of Illinois. Judge Jones, speaking for the Fifth Circuit, when rejecting the petition presented by Blaski, et al., pointed out (245 F. 2d 737):

> "The movants here, who were plaintiffs in the district court, have their *residence* in the Northern District of Illinois. They instituted suit in the district court for the Northern District of Texas against several defendants, all of whom reside in the Northern District of Texas * * * The defendants made a motion to transfer the cause, pursuant to 28 U. S. C. A. § 1404(a), to the Northern District of Illinois. In their motion the defendants stated that their witnesses were much closer to the court in Illinois than to the court in Texas. They also state, among other aver-

ments, *that there is pending in the district court for the Northern District of Illinois a consolidated action in which the plaintiffs in the Texas suit* were charging infringement of the *same patent as was involved in the suit in Texas.* It was shown that in the action in the Northern District of Illinois much pre-trial information and evidence had been developed which would be relevant in the case commenced in the Northern District of Texas. *The defendants waived their right to be sued in the Northern District of Texas and consented to the consolidation of the action with the cause pending in Illinois.* • • •

"The plaintiffs say that none of the defendants reside in Illinois and have not committed in Illinois any acts of infringement, that process issued in Illinois could not have been served on the defendants and therefore the action could not 'have been brought' in the district to which it was transferred. The attempted waiver, the plaintiffs say, is ineffectual." (Italics supplied.)

As I understand Judge Major's opinion in this rehearing, he holds that unless there is venue under 28 U. S. C. § 1400 in at least two forums, a trial judge is restrained from basing any order of transfer on 28 U. S. C. § 1404 (a). In reaching that result Judge Major disagrees, as I view it, with the Fifth Circuit that a transfer is proper on motion of a defendant who consents to the transfer (by waiving venue in the transferor court) even though the defendant is not amenable to venue in the transferee court selected by such movant, I doubt if any one would seriously urge that the *Fourco Glass Co.* v. *Transmirra Corp.*, 353 U. S. 222 (1957) holding precludes all transfers of patent cases when § 1404 (a) is involved, especially after noticing the words "any civil action" used by Congress in § 1404(a).

Literally speaking, the defendants-litigants in the case before us, "waived their right to be sued in the Northern

District of *Texas*" [See 245 F. 2d 737]; they did not, with all deference to Judge Major, waive venue "in a forum in which an action had not been and could not be properly brought by an opposing party."

Venue under 28 U. S. C. § 1400 (b) means only the place where these defendants could require the case to be tried and as a word "venue" refers neither to jurisdiction nor power to decide the case. Locality of trial is a personal privilege which these defendants could waive. *In Re Josephson*, 218 F. 2d 174, 184-185 (5th Cir. 1954), and cases there collected. Venue for commencing patent suits is predetermined by § 1400 (b), but there is nothing in that section contained preventing the place of trial from being shifted in accordance with the yardsticks of "the convenience of parties and witnesses in the interest of justice," provided by § 1404. These Texas defendants have consented to consolidation of the Texas suit with those long since pending in Illinois.

I think the Fifth Circuit penetrated the problem at hand and soundly concluded that:

> "The rule which to us seems the better reasoned and which has been adopted by the mapority of the courts, permits the transfer upon the motion or with the consent of the defendants even though they could not have been served with the process of the transferee court * * *" (245 F. 2d 737, 738).

Judicial discretion came into play after the defendant waived venue in Texas and consented to the consolidation with Illinois pending litigation on the same patents. Rather than abuse of discretion I find the District Judge in Texas displayed some sound practical common sense. Indeed I think the bare words "where it might have been brought" in § 1404 (a), are being used here as an intellectual go-cart just to wheel the case back again to Texas. This case ought to be resolved on its peculiar facts and against the

background of lawsuits begun by *Blaski, et al.* in Wisconsin and Texas. As I have previously said, there appears to be no legalistic reason just why the respondent judge should overrule the Fifth Circuit. I would deny the petition for writ of mandamus just as I would have struck down a petition in the nature of a writ prohibition, which at least would have been potentially more appropriate.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Thursday, October 16, 1958.

Before

Hon. J. Earl Major, Circuit Judge.
Hon. Philip J. Finnegan, Circuit Judge.
Hon. Elmer J. Schnackenberg, Circuit Judge.

JOHN F. BLASKI, *et al.*, *Petitioners*,
No. 12285. *vs.*
HONORABLE JULIUS J. HOFFMAN, United States District Judge, *Respondent.*

Petition for writ of mandamus on petition for rehearing.

JUDGMENT.

This matter comes before the Court on the petition for rehearing filed by petitioners John F. Blaski, *et al.*, and the reply of respondent thereto.

On consideration whereof, it is ordered and adjudged by this Court that the opinion of this Court heretofore filed in this matter on July 1, 1958 be, and the same is hereby

withdrawn and that all orders entered pursuant thereto be vacated and set aside.

It is further ordered and adjudged by this Court that the petition of petitioners John F. Blaski, *et al.*, for a writ of mandamus be allowed, and the respondent is directed to vacate and set aside his order entered March 14, 1958 and to order the civil action, docket No. 58 C 127, John F. Blaski, et al., plaintiff's *vs.* R. Howell, Jr. and Lifetime Metal Building Company, defendants, remanded to the United States District Court for the Northern District of Texas, Dallas Division, in accordance with the opinion of this Court filed this day.

Teste:

KENNETH J. CARRICK,
Clerk of the United States Court of Appeals for the Seventh Circuit.

(Seal)

ORDER DENYING REHEARING *EN BANC*.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Tuesday, November 25, 1958.

Before:

Hon. F. Ryan Duffy, Chief Judge.
Hon. Philip J. Finnegan, Circuit Judge.
Hon. Elmer J. Schnackenberg, Circuit Judge.
Hon. John S. Hastings, Circuit Judge.
Hon. W. Lynn Parkinson, Circuit Judge.
Hon. Win G. Knoch, Circuit Judge.

JOHN F. BLASKI, *et al.*,
Petitioners,
No. 12285 *vs.*
HONORABLE JULIUS J. HOFFMAN,
United States District Judge,
Respondent.
} Original Petition for Writ of Mandamus.

On consideration of the motion of counsel for Philip L. Sullivan, Chief Judge of the United States District Court for the Northern District of Illinois,

It Is Hereby Ordered that the brief as *Amicus Curiae* of Philip L. Sullivan, Chief Judge of the United States District Court for the Northern District of Illinois, tendered to the Clerk of this Court on October 25, 1958 be filed instanter.

As a majority of the judges in active service have not voted in favor of granting a rehearing *en banc*,

It Is Hereby Ordered that the petition for rehearing *en banc* filed herein on October 23, 1958 be, and the same is hereby DENIED.

(FINNEGAN, *Circuit Judge:* I vote to grant the petition for rehearing *en banc.*)

(KNOCH, *Circuit Judge:* I vote to grant the petition for rehearing *en banc.*)

FILE COPY

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JAN 19 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. [redacted] 25

HONORABLE JULIUS J. HOFFMAN, A JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION,

Petitioner,

vs.

JOHN F. BLASKI, ET AL.,

Respondents.

RESPONSE TO PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 597.

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RESPONSE TO PETITION FOR CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

This is in response to the above identified Petition for Writ of Certiorari and is for the purpose of correcting and clarifying certain statements and contentions made therein. In so doing, the following remarks are set forth under headings corresponding to the respective headings of the sections of the Petition being replied to.

"OPINIONS BELOW."

The October 16, 1958 opinion of the Court of Appeals (App. p. 14a) is reported at 260 F. 2d 317.

"QUESTION PRESENTED."

The "question presented", as stated in the Petition for Certiorari, does not bring out that the subject civil action was one for patent infringement and, under the patent statutes, could not have been properly brought in the transferee district. It also does not bring out that the plaintiffs (respondents here), at all times, have opposed the subject transfer on the grounds that the District Court had no authority or power to do so.

It is respectfully submitted that the "question presented" should be as stated by the Court of Appeals below in its majority opinion (App. p. 18a) which is as follows:

> "(1) Whether a district court, having proper venue and jurisdiction over defendants in a patent infringement action, has the power under Section 1404(a), Title 28, U. S. C. A. to transfer the cause of action, on motion of the defendants and over the objections of the plaintiffs, to a district in which venue is not proper; and
>
> "(2) Whether, under such circumstances, the transferee court acquires jurisdiction, or has the power to accept such a transfer."

"STATEMENT OF THE CASE."

The statement of the case in the Petition should point out that the defendants had answered the complaint and the case had been set for trial when the motion to transfer was filed.

It also should be pointed out that the plaintiffs have at all times opposed the transfer on the grounds that the transferor court lacked the authority and power to do so because the transferee district was not a district in which the action "might have been brought".

It also should be pointed out that neither of the defend-

ants resides in or does business in the transferee district, and that the acts of infringement alleged in the complaint were committed in the transferor district and no acts of infringement have been committed by either of the defendants in the transferee district within the knowledge or belief of the plaintiffs."

"REASONS FOR GRANTING THE WRIT."

At pages 5-7 of the Petition for Certiorari it is contended that the decision complained of is in conflict with the decisions in the cases of *Torres* v. *Walsh* (CCA-2), 221 F. 2d 319; *In Re Josephson* (CCA-1), 218 F. 2d 274; *Anthony* v. *Kaufman* (CCA-2), 193 F. 2d 85; and *Paramount Pictures* v. *Rodney* (CCA-3), 186 F. 2d 111. In making this contention counsel for Petitioner stated (at page 5):

> "In the instant case, the court expressly recognized that a conflict existed,"

and then quoted a sentence from the Court of Appeals' opinion. That sentence, lifted out of context, might erroneously indicate that the Court of Appeals stated there was a conflict between its decision and the decisions in the above mentioned four cases. The Court of Appeals did not so recognize such a conflict. In fact, there is no conflict with those four cases, and the Court of Appeals expressly so stated in the three sentences immediately preceding the aforementioned quotation, and which three sentences are as follows (App. p. 24a):

> "In all the other cases above cited, except *Torres* v. *Walsh*, it appears that one or more of the defendants could have been sued in the district to which the action was transferred. Thus, the action 'might have been properly brought' in such district. The *Torres* case involved an *in rem* proceeding in admiralty which presented a different situation as to venue and service."

Also, at pages 5-7 of the Petition, it is contended that the United States Court of Appeals for the Seventh Circuit has erroneously decided an important question of federal law. It is respectfully submitted that the decision complained of is not erroneous, as is well shown by the thorough and very carefully and logically reasoned majority opinion of that Court (App. pp. 16a-29a).

At pages 9-10 of the Petition, counsel for Petitioner refers to the fact that a defendant may waive venue in an action brought by a plaintiff in an improper district, and then makes the statement that "The instant case derogates from this salutary rule * * *." It is submitted that this argument is clearly erroneous. This is not a case where the plaintiffs have sued in an improper district and the defendants have come in and waived venue. Here, the plaintiffs have sued in the *only* district where the action could have been *properly* brought. The defendants are trying to **force** the plaintiffs to try their action in an improper district. If the plaintiffs can be **forced** into the present transferee district, they could be **forced** into **any** district in the United States without any attention being paid to the limiting words "where it might have been brought" specifically put into the statute (Sec. 1404(a), Title 28, U. S. C. A.) by Congress.

Respectfully submitted,

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BRIEF OF PETITIONER.

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BRIEF OF PETITIONER.

OPINIONS BELOW.

The opinion of the District Court (R. 14) was not reported. The first opinion of the Court of Appeals (July 1, 1958) was not reported and was withdrawn. It is not in the record but will be found at page 14a of the appendix to the Petition for Certiorari. The opinion of the Court of Appeals of October 16, 1958 (R. 34), is reported in 260 F. 2d 317.

JURISDICTION.

The jurisdiction of this Court was invoked under 28 U. S. C., section 1254 (1). Certiorari was granted February 24, 1959; 359 U. S. 904, 3 L. Ed. 2d 570.

STATUTE INVOLVED.

This case involves 28 U. S. C. § 1404(a), 62 Stat. 937 (1948), which provides as follows:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

QUESTION PRESENTED.

28 U. S. C. § 1404(a) confers authority on a United States District Court to transfer a civil action to any other district "* * * where it might have been brought." If the transfer of an action would serve the convenience of parties and witnesses and would be in the interest of justice, does 28 U. S. C. § 1404(a) confer upon a United States District Court statutory authority to transfer an action, upon motion of all defendants, to another United States District Court having jurisdiction of the subject matter but located in a district in which venue and jurisdiction over the person would be improper if the action had been instituted there and the defendants had duly objected?

STATEMENT OF THE CASE.

On March 1, 1957, the respondents filed suit in the United States District Court for the Northern District of Texas. It was alleged that respondents' patent had been infringed by R. P. Howell, Jr., a resident of Texas, and Lifetime Metal Building Company, a Texas corporation not doing business in Illinois. Pursuant to 28 U. S. C. § 1404(a), the defendants moved to transfer the case to the United States District Court for the Northern District of Illinois because two other cases involving the same patent were pending in that court and because numerous witnesses resided in that district. The defendants expressly waived their objection

to venue and personal jurisdiction. The Texas court determined that the transfer would serve the convenience of the parties and witnesses and that it would be in the interest of justice. Accordingly, the Texas court, in the exercise of its discretion, ordered the action transferred.

The respondents then sought a writ of mandamus in the United States Court of Appeals for the Fifth Circuit. The sole argument made by the respondents was that the Northern District of Illinois was not a district where the action "might have been brought" within the meaning of 28 U. S. C. § 1404(a), and that the Texas court lacked authority to transfer the action. However, the United States Court of Appeals for the Fifth Circuit held that the transfer was within the provisions of 28 U. S. C. § 1404(a) and denied the respondents' motion for leave to file a petition for a writ of mandamus. *Ex Parte Blaski*, 245 F. 2d 737 (5th Cir., 1957), cert. denied, 355 U. S. 872 (1957).

The action was transferred to the United States District Court for the Northern District of Illinois and was assigned to the calendar of the petitioner. Thereupon, the respondents moved the petitioner to return the action to Texas solely on the grounds that the Texas court lacked authority to transfer it and that the Illinois court lacked authority to accept it. The petitioner did not deem himself bound by the decision of the Fifth Circuit. Instead, he considered the question of jurisdiction *de novo* and, in an oral opinion (R. 14), denied the respondents' motion. The respondents then petitioned the United States Court of Appeals for the Seventh Circuit for a writ of mandamus to compel the return of the action to Texas. Again, the respondents contended that the Northern District of Illinois was not a district where the action "might have been brought" and that the Texas court lacked statutory authority to transfer the action. In addition, the

respondents contended that the Illinois court lacked jurisdiction to accept the transferred action. However, the respondents' petition was denied on July 1, 1958. The respondents then petitioned for a rehearing. The petition was granted, and, without re-argument, the original judgment was vacated and the writ of mandamus was issued on October 16, 1958, one judge dissenting (R. 34). The court held that:

> "If when a suit is commenced, plaintiff has a right to sue in that district, independently of the wishes of defendant, it is a district 'where it might have been brought.' If he does not have that right, independently of the wishes of defendant, it is not a district 'where it might have been brought,' and it is immaterial that the defendant subsequently acquiesces." (R. 39.)

The petitioner then moved for a rehearing *en banc*, but the motion was denied on November 25, 1958, two judges dissenting (R. 51).

ARGUMENT.

It is the position of petitioner that the decision of the court below was based upon an analysis of Section 1404(a) which looked no further than the bare words of the section. It was completely divorced from a consideration of the intention of Congress, the convenience of the parties, the interests of justice, or the history of the act before and after its passage.

In view of the fact that four Courts of Appeals have interpreted the act differently from the Court of Appeals for the Seventh Circuit, we do not imagine that respondents can contend that the act is unambiguous.[1] Petitioner therefore presents to this Court a question as to the interpretation of an ambiguous statute and asks that it be interpreted in accordance with the ordinary precepts of law as applied to statutory interpretation. Every one of these ordinary precepts was ignored by the Court of Appeals below.

I.

Section 1404(a) Is a Remedial Statute.

This section was adopted to overcome the lack of a convenient remedy, in contrast to that of *forum non conveniens* as applied in *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501 (1947). See Braucher, "The Inconvenient Federal Forum," 60 Harv. L. Rev. 908, 933 (1947), and note "The

1. The Court of Appeals below did say that the phrase "where it might have been brought" is "unambiguous, direct and clear." We think that this decision by a divided court imputes too little credit to the judges of the First, Second, Third and Fifth Circuits. Opinions by some fourteen circuit judges should be enough to satisfy any court that there is something to be said in behalf of a construction found by them.

Proposed Revision of the Federal Judicial Code," 60 Harv. L. Rev. 424, 435 (1947).

Being a remedial statute, it is to be liberally construed, and where there are two possible interpretations the more liberal is to be applied. *Stewart* v. *Kahn*, 78 U. S. 493, 504; 20 L. Ed. 176, 178 (1871).

In this particular instance, we think it serves little point to perform a literary autopsy upon individual words of the statute. We believe it sufficient to point out that there are at least two ways in which Section 1404(a) may be interpreted on a literal basis to provide a full grammatical basis for the interpretation applied by petitioner.

In the first place, the word "brought" may be interpreted to mean "commenced" as set forth in the opinion of Judge Biggs in *Paramount Pictures, Inc.* v. *Rodney*, 186 F. 2d 111, at 114.

Secondly, the word "might" was selected by Congress rather than the word "could." If the section had said "could," it might have implied that the plaintiff could, as a matter of right, have maintained his suit in the district to which transfer was sought. On the other hand, the selection of the word "might" is a clear indication that Congress foresaw that the ability to maintain a suit in the transferee jurisdiction might be dependent upon an outside permission.

These constructions, having a suitable literary foundation, should be sufficient to justify the liberal construction of the statute—particularly in the interests of justice.

II.

The History of the Act Indicates the Intention of Congress to Recognize the More Liberal Interpretation of Section 1404(a).

The expressed intention of Congress at the time the act was passed was, as pointed out above, to provide a new remedy. The intention of Congress as expressed after the passage of the act can, of course, only be drawn by inference. It has, however, frequently been pointed out that the failure of Congress to amend a statute after a series of judicial interpretations of the act is evidence that Congress intended that construction.

This is particularly true where the act itself has been under study by Congress in the meanwhile. See *National Labor Relations Board* v. *Gullett Gin Company, Inc.*, 340 U. S. 361, 365, 366 (1951), and *State of Missouri* v. *Ross*, 299 U. S. 72, 75; 81 L. Ed. 46, 49 (1936).

In the case of the Judicial Code, we need not point out that Congress relies upon this Court and that this Court has delegated at least its preliminary supervision to the Judicial Conference. In 1950-1951 some thirteen bills were submitted to Congress (and by it to the Judicial Conference), which sought to limit Section 1404(a), although in a different manner from that accomplished by the decision below. The Conference had the subject under study and recommended no change in Section 1404(a).

The report No. 1706 of the House of Representatives, 85th Congress, 2nd Session, pages 14, 21 and 27-29, sets forth the Judicial Conference report of March 12, 1951, and the proceedings from that time to 1957, including specific reference to the proposed changes in Section 1404(a). The fact that the section was under study during the period of the decisions by the First, Second, and Third Circuit Courts of Appeals (whose judges were represented on the

Conference) is clear indication that the situation is well within the rule of *National Labor Relations Board* v. *Gullett*, and *State of Missouri* v. *Ross*, *supra*.

III.

Petitioner's Interpretation of the Act Is in the Interests of Justice.

An ambiguous act, under proper rules of statutory construction, should be interpreted to avoid injustice, if any other interpretation is possible. *Knowlton* v. *Moore*, 178 U. S. 41, 77; 44 L. Ed. 969, 984 (1900).

In the present case there has been a finding of fact by both the District Court in Texas and by petitioner in the District Court here that the interests of justice will be promoted by the transfer from Texas to Illinois. This finding is not challenged.

There can be no question but what the same factors would apply in countless other cases.

If the opinion of the Court of Appeals below is correct, then it is difficult to conceive of any diversity of citizenship case concerning an individual defendant that could be transferred. Only in the unlikely situation where the defendant was domiciled in one state but happened to be available in the state where the plaintiff lived, could there be a transfer. Certainly Congress did not intend to remove from individual defendants their right to transfer to a jurisdiction convenient to them, and to the witnesses, and in which the interests of justice would be promoted by the transfer.

A similar situation would result in patent cases where transfer by both corporate and individual defendants would be severely curtailed.

The court below appeared fearful that a liberal construction of Section 1404(a) would permit transfers to

inconvenient and unjust forums. This presupposes a direct violation of the terms of the section itself by a district court, and, as this Court said in *Ivanhoe Irrigation District* v. *McCracken*, 357 U. S. 275, 2 L. Ed. 2d 1313, at 1330 (1958),

> "The prospect is too improbable to figure in our decision."

The Decisions of the Courts of Appeals for the First, Second, Third and Fifth Circuits Should Be Followed.

Petitioner's interpretation of Section 1404(a) has been adopted by the United States Courts of Appeals for the First, Second, Third and Fifth Circuits: *Ex Parte Blaski*, 245 F. 2d 737 (5th Cir., 1957), cert. denied, 355 U. S. 872 (1957); *Torres* v. *Walsh*, 221 F. 2d 319 (2d Cir., 1955), cert. denied, 350 U. S. 836 (1955); *In Re Josephson*, 218 F. 2d 174 (1st Cir., 1954); *Anthony* v. *Kaufman*, 193 F. 2d 85 (2d Cir., 1951), cert. denied, 342 U. S. 955 (1952); and *Paramount Pictures, Inc.* v. *Rodney*, 186 F. 2d 111 (3rd Cir., 1951), cert. denied, 340 U. S. 953 (1951). It was, in effect, adopted by the United States Court of Appeals for the Seventh Circuit in *General Casualty Co.* v. *Grubb*, 253 F. 2d 51 (7th Cir., 1958), cert. denied, 357 U. S. 907 (1958), even though that Court may have erroneously treated the problem as involving discretion rather than jurisdiction.[1] Only in the instant case has a United States Court of Appeals adopted the opposite interpretation, thereby frustrating that construction of Section 1404(a) which favors the interests of justice.

---

1. "By their motion to transfer defendants have agreed to become amenable to process in Oklahoma, and we cannot say Judge Grubb abused his discretion by viewing their consent as squaring with the phrase 'where is [*sic*] might have been brought' found in § 1404. See *Ex Parte Blaski*, 5 Cir., 1957, 245 F. 2d 737." (253 F. 2d at p. 53.)

It is interesting to note that the Court cited the *Blaski* decision which permitted the transfer of the instant action to the Northern District of Illinois, and which decision the Court declined to follow in the case at bar.

The doctrine of waiver is well established in the common-law of procedure. In addition, it is embraced by statute. Rule 12(h), Federal Rules of Civil Procedure, provides that the failure to make a timely objection constitutes a waiver as to all matters except (1) failure to state a claim or defense, (2) failure to join an indispensable party, and (3) want of jurisdiction over the subject matter. These matters are not before this Court.

Further, 28 U. S. C. § 1406(b) provides:

> "Nothing in this chapter [relating to venue] shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue."

The Revisor's Note to § 1406(b) states:

> "Subsection (b) is declaratory of existing law. (See *Panama R. R. Co.* v. *Johnson*, 1924, 44 S. Ct. 391, 264 U. S. 375, 68 L. Ed. 748.) It makes clear the intent of Congress that *venue provisions are not jurisdictional but may be waived.*" (Emphasis supplied.)

Sections 1404(a) and 1406(b) were enacted at the same time and should be construed together to permit waiver in cases transferred pursuant to § 1404(a). As stated in *Paramount Pictures, Inc.* v. *Rodney, supra*:

> "We can conceive of no reason in view of the provisions of § 1406 why candid voiced *express consent* should not be deemed to be as potent an actor in the drama of venue as puling *no seasonable objection.*" (186 F. 2d at p. 115.) (Original italics.)

The foregoing discussion, although limited to venue, applies with equal vigor to jurisdiction over the person, objections to which, in any case, can be waived.

CONCLUSION.

In *In Re Josephson*, 218 F. 2d 174 (1st Cir., 1954), Chief Judge Magruder stated, at p. 184:

> "Long before § 1404(a) was enacted, it was held, under earlier venue statutes providing that an action 'may be brought' only in certain districts, that venue requirements might be waived, conferring as they did only a personal privilege for the convenience of litigants, and that when a party chose to waive such privilege the action might not only be brought, it might be maintained, in a district not having statutory venue. See *Commercial Casualty Ins. Co.* v. *Consolidated Stone Co.*, 1929, 278 U. S. 177, 49 S. Ct. 98, 73 L. Ed. 252; *Neirbo Co.* v. *Bethlehem Shipbuilding Corp., Ltd.* 1939, 308 U. S. 165, 60 S. Ct. 153, 84 L. Ed. 167. Reading § 1404(a) in the light of this settled doctrine, it seems to us altogether proper to hold that a case may be transferred to a district not having statutory venue provided the defendant or defendants for whose benefit the venue privilege is conferred agree to waive the same. Such an interpretation indeed is to be favored, since it tends to enhance the usefulness of this important provision for administrative transfer of cases in the interest of convenience and justice."

The decision of the petitioner at the trial level was consistent with the well-established doctrine of waiver, with the purpose and legislative history of § 1404(a), with the rules of statutory construction and with sound policy. That decision was reversed by the decision of the United States Court of Appeals for the Seventh Circuit. It is respectfully submitted that the latter decision should be reversed by this Court.

Respectfully submitted,

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To The Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

QUESTION PRESENTED.

The "Question Presented", as stated in the Brief for Petitioner, ignores the fact that the subject civil action was one for patent infringement and, under the Patent Statutes, could not properly have been brought in the transferee district (Illinois). It also does not bring out that the plaintiffs (respondents here) at all times, have opposed the subject transfer on the grounds that the transferor District Court (Texas) had no authority or power to do so.

It is respectfully submitted that the "Question Presented" should be as stated by the Court of Appeals below in its majority opinion (R. 36) which is as follows:

> "(1) Whether a District Court, having proper venue and jurisdiction over defendants in a patent infringement action, has the power under Section 1404(a), Title 28, USCA, to transfer the cause of action, on motion of the defendants and over the objections of the plaintiffs, to a district in which venue is not proper; and
>
> (2) Whether, under such circumstances, the transferee Court acquires jurisdiction, or has the power to accept such a transfer."

ARGUMENT.

The United States Court of Appeals for the Seventh Circuit, in a very thorough, logical and carefully reasoned opinion in this case (R. 34-46) has answered both of the above set forth questions in the negative. That Court further observed that to hold otherwise would be to emasculate an express provision of the very statute (Sec. 1404(a), Title 28 USC) under which the defendants in the original case below sought to have this case transferred from the district court in Texas to the district court in Illinois after a trial date had been set in the Texas Court.

It is respectfully submitted that, as will be briefly discussed hereinafter, the aforementioned opinion of the United States Court of Appeals for the Seventh Circuit is in accordance with the law and the established rules of statutory construction, and should be affirmed.

THE STATUTORY SECTION UNDER WHICH TRANSFER OF THIS CASE WAS SOUGHT.

Section 1404(a), Title 28 USC, is the statutory section under which transfer was sought in this case. It provides as follows:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division *where it might have been brought*"*

* Emphasis added throughout this brief unless otherwise indicated.

THE STATUTORY SECTION UNDER WHICH THIS ACTION WAS BROUGHT.

The civil action which forms the subject matter of this case and which the defendants sought to transfer from the Texas court to the Illinois court was one for patent infringement. Therefore, it was brought under Sec. 1400(b), Title 28 USC of the patent statute. As this Court stated in *Fourco Glass Co.* v. *Transmirra Products Corp., et al.*, 353 U. S. 222, at page 229:

> ". . . 28 USC Sec. 1400(b) is the *sole* and *exclusive* provision controlling venue in patent infringement actions . . ."

That section provides as follows:

> "Any civil action for patent infringement *may be brought* in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business."

Both the Petitioner and the respondents agree that Illinois does not qualify under the provisions of this section of the patent statutes, and that Texas does.

PRIOR TO SEC. 1404(a) FEDERAL DISTRICT COURTS HAD NO POWER TO TRANSFER CIVIL ACTIONS FROM ONE DISTRICT TO ANOTHER.

As the Petitioner stated in his opinion below (R. 16):

> "Absent 1404(a) a district court would have no authority to transfer an action to another district, nor would a district court have authority to accept such a transfer".

That, of course, is true.

It is well established that the district courts have no inherent powers to transfer a cause from one district to another, and that the only powers that they have in this

regard are those specifically granted to them in the form of statutory grants.

Thus, for example, in the case of *Fettig Canning Co.* v. *Steckler* (CCA-7, 1951), 188 F. 2d 715, 717, the Court stated in part as follows:

> "No authority need be cited for the proposition that the jurisdiction of a Federal Court is limited to that which Congress has expressly conferred."

In the case of the *United States* v. *Hudson, et al.* (U. S. S. Ct., 1812), 7 Cranch 72, 3 L. Ed. 259, 260, the Supreme Court gave early express recognition to the now well established principle that, other than the Supreme Court, the Federal Courts of the United States possess no jurisdiction other than that specifically vested in them by Congress. In this regard, the Court stated in part as follows:

> "Of all the courts which the United States may, under their general powers, constitute, one only—the Supreme Court—possesses jurisdiction derived immediately from the constitution, and of which the legislative power cannot deprive it. *All other courts created by the general government possess no jurisdiction but what is given them by the power that creates them,* and can be vested with none but what the power ceded to the general government will authorize them to confer."

In the relatively recent case of *Richlin* v. *American Smelting and Refining Company,* 136 F. Supp. 577 (D. S. S. D. Calif., N. D., 1955), in denying a motion of defendant for a change of venue to a forum where the action could not have been brought originally, the Court (Jertberg, J.) stated as follows at pages 580 and 581:

> "The plaintiff could not have 'brought' the action there originally. *This is not a question of venue or jurisdiction that can be waived by the parties. It is a*

question of the power of a Court to transfer the action. This is a case similar to *United States* v. *11 Cases, etc.*, D. C., 94 F. Supp. 925, 927, in which Judge Fee, presently a member of the Ninth Circuit Court of Appeals, said that *the existence of the power of transfer is jurisdictional, and may only be exercised in strict accordance with the statutory grant.*

> "A district court is a separate entity. No district court has jurisdiction crossing a state line. *By virtue of these limitations, the transfer of any cause from one district to another is a question of power. No district court has such inherent authority. There must be an express statutory grant as a condition precedent to the initiation of the transfer, and every essential factor must be present to confer jurisdiction on the court to which the case is sent.*"

Sec. 1404â has given District Courts power to transfer a civil action to another district. However, that power is specifically limited, as will be discussed hereinafter.

THE TRANSFEREE COURT MUST INQUIRE INTO JURISDICTION.

The Petitioner agrees (R. 17) with respondents that the transferee court must inquire into the jurisdiction of the transferor court and into its own jurisdiction to accept the transfer, and that the transferee court is not bound by an erroneous decision of a court in another circuit (*United States* v. *Reid*, E. D. Ark., 104 F. Supp. 260, 266; and *Wilson* v. *Kansas City Southern Railway Company*, W. D. Mo., 101 F. Supp. 56, 60).

UNDER THE DOCTRINE OF FORUM NON CONVENIENS THE ILLINOIS DISTRICT WOULD NOT HAVE QUALIFIED AS A SECOND FORUM IN THIS CASE.

Prior to the adoption of Sec. 1404(a), Title 28 USC, a district court could, in proper cases, dismiss an action for purposes of permitting it to be refiled in another forum under the doctrine of *forum non conveniens*. It was well established law under that doctrine that

> "In all cases in which the doctrine of *forum non conveniens*" came into play, it presupposed "at least two forums in which the defendant is amenable to process." *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 506, 507.

There is no question but that the present transferee district (Illinois) would not have qualified under the doctrine of *forum non conveniens* as the second forum in which the case could have been refiled if the transferor court had dismissed it.

THE PURPOSE OF SEC. 1404(a) WAS TO RENDER APPLICABLE THE DOCTRINE OF FORUM NON CONVENIENS TO ALL CIVIL ACTIONS.

The purpose of Sec. 1404(a), Title 28 USC, was to render applicable the doctrine of *forum non conveniens* to *all* civil actions. In the case of *Ex parte Collette*, 337 U. S. 55, this Court stated with respect to Sec. 1404(a), at page 56, as follows:

> "In this case we must decide whether the venue provisions of the judicial code render applicable the doctrine of *forum non conveniens* to actions under the Federal Employers Liability Act."

It then went on to hold that Sec. 1404(a) rendered the doctrine of *forum non conveniens* applicable to *any* civil action.

The doctrine of *forum non conveniens* has always re-

quired two forums in which jurisdiction would have been proper at the time suit was commenced. That has not changed. Thus, in the case of *Norwood* v. *Kirkpatrick*, 349 U. S. 29 (wherein the *Ex parte Collette* decision was cited with approval), the Supreme Court held that although a transfer could be made on a lesser showing of inconvenience,

> "This is *not* to say that the *relevant factors* have changed or that the plaintiff's choice of forum is not to be considered, but only that the discretion to be exercised is broader."

One of those "relevant factors" which this Court has expressly said is *not* changed is the necessity for a second forum in which the action might *properly* have been brought originally. Congress continued this specific limitation by providing that a transfer may be made only to a district where the action "*might have been brought*". The patent statute (Sec. 1400(b), Title 28 USC) which this Court has specifically held is controlling in cases of this nature (*Fourco Glass Co.* v. *Transmirra Products Corp., et al.*, 353 U. S. 222, 229, *supra*), states that patent infringement actions

> "*may be brought* in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business,"

and provides for no other forum. The Illinois district admittedly does not qualify under either of these requirements.

THE ESTABLISHED RULES OF STATUTORY CONSTRUCTION REQUIRE THAT NO TRANSFER BE PERMITTED IN THIS CASE TO THE ILLINOIS DISTRICT.

As is stated in "Statutes and Statutory Construction", 3rd Ed., by G. J. Sutherland,

> "'It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute' (citing cases). A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, * * *"

That is in accordance with the law as laid down by this Court in the case of *United States of America* v. *Menasche*, 348 U. S. 528, 538, 539, wherein this Court stated as follows at pages 538 and 539:

> "It is our duty 'to give effect, if possible, *to every clause and word* of a statute,' *Montclaire* v. *Ramsdell*, 107 U. S. 147, 152, 27 L. Ed. 431, 433, 2 S. Ct. 391; rather than to emasculate an entire section, as the government interpretation requires."

The presence or absence of abuse of discretion is not involved in the present case at all. The important question, which is clearly presented by the facts of this case, involves *only* the meaning of the words "where it might have been brought." That question is:

> Has Section 1404(a) Title 28 USCA, by providing that a cause of action may be transferred to another district "where it might have been brought," given the federal district courts the absolutely revolutionary power to **force** a plaintiff to try his case in **any** district in the United States without any regard to the question of whether the action could have been *properly* brought in the transferee district under the statutes defining where actions of that type "may be brought".

Unless the answer to that question is in the affirmative, this case absolutely could not be transferred to Illinois. There

is no more reason why this case could be transferred to Illinois than to **any** other district in the United States. Therefore, unless the answer to the above question is in the affirmative, the transferor court (Texas) did not have the *power* to transfer the case, and the transferee court (Illinois) did not have the *power* to accept such a transfer, and the attempted transfer was void *ab initio* and did not give the transferee court jurisdiction over the cause of action.

Section 1404(a) has two portions. One is the discretionary portion which calls upon a district court to determine whether a transfer, if made, would be for the convenience of the parties and witnesses, and in the interest of justice. The second portion is a *mandatory limitation* on the choice of districts to which such an action may be transferred. In that second portion, Congress granted the power to transfer an action to a district only "*where it might have been brought*". There is no discretion involved in that portion. It is an express limitation on the *power* to transfer. It is a clause to which it is the Court's duty to give effect under the aforementioned ruling of this Court in the *Menasche* case, 348 U. S. 528, *supra*.

It begs the question, and is misleading, to argue, as has been done by counsel for the Petitioner (pages 10 and 11), that the plaintiffs *could* have "brought" (improperly) the action in Illinois and, then, the defendants *could* have come in and waived venue and answered generally and, therefore, Illinois qualifies under the statute. If that is true, **any** other district would qualify. This is not a "waiver of venue" case. In those cases, either both parties stipulate to try a case in what would otherwise be an improper district, or the plaintiff files suit in an improper district (and thereby consents to it), and the defendant then comes in and waives venue. In either of those events, *both* parties have *consented* to try the case in what would otherwise be

an improper district. That is not the case here. In this case the defendant is attempting to **force** the plaintiff to try a case in an improper district. There is no more reason why a plaintiff should be subject to being **forced** into an improper district than a defendant should be subject to being so **forced**. If Congress had meant to make such a revolutionary change in our laws, it would have very carefully and emphatically spelled it out. It did not so spell it out. On the contrary, it incorporated an express limitation as to the districts to which an action could be transferred.

The present case involves a particular federal statute (the patent statute, Sec. 1400(b), Title 28 USC'A) which specifically states in which federal district an action of this nature "may be brought." The transferor court (where the plaintiff brought the action, and where a trial date had already been set) fully qualified as a proper district under that statute. The transferee district (Illinois) does not so qualify. If the present plaintiffs may be **forced**, by the venue-hunting defendants' motion to transfer, then they could just as well have been forced to try this action in **any** other district in the United States. There is no more reason why Illinois would qualify in this case as a district "*where the action might have been brought*" (which is laid down as a requirement for transfer under Sec. 1404(a), Title 28 USC) than any of the other federal districts in the United States. Certainly, the Court of Appeals for the Seventh Circuit was entirely correct in holding that Illinois was not a district which qualified as a transferee district. A contrary decision would open wide the door for venue shopping defendants to transfer cases into **any** district in the United States, without regard to whether or not the action could properly have been brought in the transferee district.

It is inconceivable that Congress would have introduced

such a revolutionary concept into our laws without having very carefully spelled it out. Congress did not do so. In fact, rather than spelling out any such broad, revolutionary power, Congress *limited* the power to select a transferee district by saying that a transfer could be made to a district "where it might have been brought". Certainly, Congress meant that section to be read with the other sections (such as the patent statute, Sec. 1400(b), Title 28 USC, involved herein) which specifically spell out where an action "may be brought".

It is misleading to contend, as counsel for Petitioner have done in their brief (page 8), that "Certainly Congress did not intend to *remove* from individual defendants their right to transfer to a jurisdiction convenient to them * * *." Defendants never had any such right, prior to the adoption of Sec. 1404(a), unless there were two *proper* forums. Sec. 1404(a) has not given defendants any such new right.

PETITIONER, HIMSELF, ADMITS THAT A HOLDING THAT THE PRESENT CASE MAY BE TRANSFERRED TO ILLINOIS DOES GREAT VIOLENCE TO THE ESTABLISHED RULES OF STATUTORY CONSTRUCTION.

Petitioner, himself, in his opinion below, admits that holding that the present case may be transferred to the Illinois district does great violence to the established rules of statutory construction. Thus, in his opinion, petitioner stated as follows (R. 25):

> "Gentlemen, personally I am of the opinion that the dissent in *Paramount against Rodney* [186 F. 2d 111, 116] is supported by the greater weight of reason and logic and this Court, if I were to rely on my own personal inclination, should retransfer this case to Texas.
>
> "Those cases supporting transfer to this district,

I think, do great violence to the established rules of statutory construction.

"They seem to create a doctrine of retroactive waiver in order to reach the conclusion that the action might have been brought."

This statement of the Petitioner is sufficient answer, in and of itself, to the contrary contentions set forth by counsel for Petitioner in the "Brief of Petitioner" in the strained "literary autopsy" which they decry but perform in their brief (page 6). To adopt the theory of counsel for Petitioner that "might have been brought" in Sec. 1404(a) means any district in which the action might have been "commenced" by mere filing of the complaint, entirely emasculates this portion of the statute. An action may be "commenced" (even if improperly) by the filing of a complaint in *any* district. Therefore, if counsel's contention is correct, the section would be complete without the words "might have been brought". Hence, those words would be rendered meaningless. That is entirely contrary to the law as it has been laid down by this Court, namely, that it is the Court's *duty*

> "to give effect to *every clause and word* of a statute," *United States* v. *Menasche*, 348 U. S. 528, 538, 539, *supra*.

CONTRARY TO THE CONTENTIONS OF PETITIONER'S COUNSEL THE COURTS OF APPEALS FOR THE FIRST, SECOND AND THIRD CIRCUITS HAVE NOT ADOPTED PETITIONER'S INTERPRETATION OF SEC. 1404(a).

At page 9 of the "Brief of Petitioner", counsel for the petitioner states that the "Petitioner's interpretation of Section 1404(a) has been adopted by the United States Courts of Appeals for the First, Second, Third, and Fifth Circuits." They then cite *Ex parte Blaski*, 245 F. 2d 737 (CCA-5); *Torres* v. *Walsh*, 221 F. 2d 319 (CCA-2); *In re*

Josephson, 218 F. 2d 174 (CCA-1); *Anthony* v. *Kaufman*, 193 F. 2d 85 (CCA-2); and *Paramount Pictures, Inc.* v. *Rodney*, 186 F. 2d 111 (CCA-3), as supporting this contention. With the exception, of course, of the decision of the Court of Appeals for the Fifth Circuit in this same case (*Ex parte Blaski*, 245 F. 2d 737, *supra*), *none* of the above mentioned cases have *adopted* the Petitioner's interpretation of Sec. 1404(a). In all of the other above cited cases except *Torres* v. *Walsh*, one or more of the defendants could have been sued in the district to which the action was transferred. Hence, the action "might have been" properly "brought" in such district. The *Torres* v. *Walsh* case was an admiralty case, and the facts as stated by the Court of Appeals in its opinion, showed that the vessel involved had been repeatedly in the territorial waters of Puerto Rico (the transferee district) and, therefore, the plaintiff could have properly brought the action in Puerto Rico if he had so desired. These differences between those four cases and the instant case was specifically recognized and commented upon by the Court of Appeals for the Seventh Circuit in its opinion below (R. 41).

CONTRARY TO THE CONTENTIONS OF PETITIONER'S COUNSEL THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT DID NOT PREVIOUSLY ADOPT THE PETITIONER'S INTERPRETATION OF SECTION 1404(a).

Counsel for the Petitioner then states (page 9) that Petitioner's interpretation "was, in effect, adopted by the United States Court of Appeals for the Seventh Circuit in *General Casualty Co.* v. *Grubb*, 253 F. 2d 51." This is a misleading statement. In the *General Casualty Co.* case, the action could have been properly brought against one of the defendants (the driver of the car) in the transferee district (Oklahoma) so that it "might have been brought" in Oklahoma. The Court of Appeals for the Seventh Circuit in its decision on the case stated (page 53):

"* * * we are *appraising discretion* exercised under Sec. 1404 by the district court and all we can do is determine whether the respondent Judge abused it while at the same time, guarding against substituting of our discretion for his."

The United States Court of Appeals for the Seventh Circuit in its opinion below in the present case specifically stated (R. 45) that the question of *power* to transfer was *not* decided in the *General Casualty Co.* case and that the decision in that case was solely on the issue of the district court's discretion.

CONTRARY TO THE CONTENTIONS OF PETITIONER'S COUNSEL OTHER COURTS OF APPEALS HAVE "ADOPTED" THE SAME INTERPRETATION OF SECTION 1404(a) AS HAS THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN THIS CASE.

After having made the last two mentioned statements, counsel for the Petitioner at page 9 of the "Brief of Petitioner" states:

"Only in the instant case has a United States Court of Appeals adopted the opposite interpretation * * *."

This is also in error. Under the loose meaning of the word "adopted" as that word was used in counsel's other two above-mentioned statements, there can be no question but what the Courts of Appeals in the following cases "adopted" the opposite interpretation:

Shapiro v. *Bonanza Hotel Co.* (CCA-9), 185 F. 2d 777, 780;

Foster-Milburn Co. v. *Knight* (CCA-2), 181 F. 2d 949, 952, 953.

Chicago, R. I. & P. R. Co. v. *Igoe* (CCA-7), 212 F. 2d 378, 379; and

Blackmar v. *Guerre, et al.* (CCA-5), 190 F. 2d 427.

In the above-mentioned *Shapiro* case (185 F. 2d 777), the plaintiff had brought a motion to transfer under Sec. 1404(a). In ruling against the plaintiff, the Court of Appeals for the Ninth Circuit stated as follows at page 780:

> "We adhere to the view that the use of the word 'brought' *presupposes* jurisdiction over the defendant which is to be obtained *only* by and through conformance with the requirement of Rule 4(f)."

In the *Foster-Milburn Co.* case (181 F. 2d 949), the United States Court of Appeals for the Second Circuit overruled the district court's allowance of a motion brought by the plaintiff to transfer an action from New York to California. The decision of the Court of Appeals in that case was on the basis (pages 952, 953) that Rule 3 of the Federal Rules of Civil Procedure

> "does not make the filing of a complaint the equivalent of 'bringing an action' under Sec. 1404(a)",

and that

> "The revisers say that Sec. 1404(a) 'was drafted in accordance with the doctrine of *forum non conveniens,*' and that the doctrine *always 'presupposes at least two forums in which the defendant is amenable to process'.*"

In the *Chicago, R. I. & P. R.* case (212 F. 2d 378), the United States Court of Appeals for the Seventh Circuit on a petition for writ of mandamus remanded the case back to the district court with directions to further consider the matter. In that case the respondent had refused to transfer an action to the Southern District of Iowa. In a footnote in its opinion, the Court stated (page 379) with respect to Sec. 1404(a) that

> "this section *presupposes two jurisdictions in which venue may be laid.*"

In the *Blackmar* case (190 F. 2d 427), even the United States Court of Appeals for the Fifth Circuit (which held to the contrary in the present case) stated at page 429 as follows:

> "Transfer under those sections [1404(a) and 1406(a)] is *limited to districts where the suit could be originally brought*".

In its opinion in this case, that Court specifically refused to follow that statement, stating that the statement was unnecessary to the decision (R. 11).

DISTRICT COURT DECISIONS IN FIVE DIFFERENT CIRCUITS SUPPORT THE COURT OF APPEALS' DECISION BELOW.

District court decisions in five different circuits support the decision of the United States Court of Appeals for the Seventh Circuit in this case, and are directly in conflict with the decision of Petitioner. These decisions were handed down in the following cases:

General Electric Co. v. *Central Transit Warehouse Co., et al.* (W. D. Mo. W. D.), 127 F. Supp. 817;

Hampton Theatre, Inc. v. *Paramount Film Distributing Corporation, et al.* (D. C. D. C.), 90 F. Supp. 645;

Johnson v. *Harris* (D. C. E. D. Tenn. S. D.), 112 F. Supp. 338;

Sheridan et al. v. *Pan-American Refining Corp., et al.* (D. C. S. D. N. Y.), 123 F. Supp. 81; and

Felchlin v. *American Smelting & Refining Company* (D. C. S. D. Calif. N. D.), 136 F. Supp. 577.

That these cases supported the present respondents was specifically recognized (R. 11) by the United States Court of Appeals for the Fifth Circuit in its earlier decision in connection with the instant case.

In the above mentioned case of *General Electric Co.* v. *Central Transit Warehouse Co., et al.*, 127 F. Supp. 817, Judge Whittaker (now a Justice of this Court) agreed with the dissenting members in the aforementioned *Paramount Pictures* case and in a carefully reasoned and entirely logical opinion stated in part as follows at pages 825, 826 and 827 (emphasis the Court's):

> "We recognize of course, that venue can be waived. So can jurisdiction over the person be waived. But does such a waiver of either or both—made *after* an action has been 'commenced' (by the mere filing of a complaint with the clerk *in any district*, see Fed. Rules Civ. Proc. Rule 3, 28 U. S. C. A.)—establish that the action 'might have been brought' there, in the sense of that phrase as used in Section 1404(a), Title 28 U. S. C. A.? If it does, what, if any, meaning is left to the phrase 'where it might have been brought', as adopted by Congress and used in the statute? Would not such construction permit transfer of the action to *any district desired by the moving defendants*, though they, or some of them, could not have been served with process there, and no statutory venue existed there and the action could not have been *maintained* there, without their intentional waiver of venue and entry of general appearance? I think no such treatment can be given to that phrase in the statute. It, says Judge Learned Hand, 'presupposes at least two forums in which the defendant is amenable to process.' *Foster-Milburn Co.* v. *Knight*, 2 Cir., 181 F. 2d 949, 952.
>
> . . . . . .
>
> "We adhere to our original conclusion that a district court is without power to transfer a cause, under Section 1404(a), Title 28 U. S. C. A., to a district without statutory venue and wherein service of process could not have been had and involuntary personal jurisdiction acquired, because, under these circumstances, the action could not have been 'brought' in that district."

It is respectfully submitted that, as the Court of Appeals below stated in its opinion (R. 42), the reasoning and logic of Judge Whittaker in the last mentioned case is unassailable.

CONCLUSION.

It is respectfully submitted that for the reasons stated, and under the authorities cited, the decision of the United States Court of Appeals for the Seventh Circuit herein is entirely correct and should be affirmed by this Court.

Respectfully submitted,

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Chicago, Illinois, September 4, 1959.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 25

HONORABLE JULIUS J. HOFFMAN, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION,

Petitioner,

vs.

JOHN F. BLASKI, ET AL.,

Respondents.

REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

Since respondents' brief does not challenge our contention that Section 1404(a) is ambiguous, nor challenge the rules of statutory construction which petitioner's original brief laid down, we stand upon the original brief.

The Court's attention is called to *Continental Grain Company* v. *Federal Barge Lines, Inc.*, 268 F. (2) 240 (C. A. 5), which was reported after respondents' brief was filed. This increases the number of Courts of Appeals judges who have found petitioner's construction of Section 1404(a) to be the correct one.[1]

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1. First Circuit Judges: Magruder, Woodbury, Hartigan; Second Circuit Judges: Coxe, Frank, Swan, Medina; Third Circuit Judges: Biggs, Maris, Goodrich, Kalodner, Staley; Fifth Circuit Judges: Hutcheson, Rives, Jones, Brown, Wisdom; and Seventh Circuit Judges: Finnegan, Hastings and Parkinson.

Respondents' brief does have a number of errors which, for the convenience of the Court, are pointed out herein.

1. In *R. F. Felchlin, et al.* v. *American Smelting and Refining Company*, 136 F. Supp. 577, cited by respondents at p. 5 of their brief, the plaintiff could not have sued in the foreign jurisdiction because he was an executor, and had no power to sue outside of the state of his appointment. The case, therefore, had nothing to do with the subject matter of this petition.

2. Respondents' new argument that the doctrine of *forum non conveniens* presupposes two forums, while not relevant to the present discussion, is not entirely correct. As was pointed out by Professor Braucher in the article, "The Inconvenient Federal Forum," Vol. 60, Harvard Law Review, p. 908, at 932 and footnote 139, it was not unknown at common law for the court to provide as a condition for the dismissal of a case on the doctrine of *forum non conveniens* that the defendant waive all matters of service and venue in the convenient jurisdiction.

3. On p. 9 respondents state that statutes must not be construed in such a way as to emasculate them. The construction sought by respondents is that which emasculates the statute by removing substantially all scope from it.

A diversity suit involving an individual defendant could be removed only in the remotely possible situation where the defendant worked in the district where plaintiff was a resident, but lived in another district. A patent suit against an individual defendant would practically never be removable.

On the other hand, petitioner's construction still leaves room for proper application of the term, "where it might have been brought." For example, the plaintiff cannot ask for a transfer to a jurisdiction where there is no

proper venue. Respondents' own brief refers to the case of *R. F. Felchlin, et al.* v. *American Smelting and Refining Company*, 136 F. Supp. 577, where the statute was properly applied to prevent transfer because the plaintiff had no right to sue in the proposed transferee district, he being an executor without power to sue outside his own state.

4. Respondents say on p. 10 that if petitioner's decision is correct, a transfer may be had to any district where jurisdiction of the subject matter exists, providing defendant agrees to be sued there.

The statement is partly true. Plaintiff's choice of a forum is respected except where the interests of justice require transfer to another jurisdiction.

5. Respondents on p. 10 argue that waiver should be mutual, and that the construction given to Section 1404(a) does not impart mutuality.

Mutuality implies equality of justice for both. The only occasion for a transfer arises when the forum selected would subordinate justice to plaintiff's selfish interests. The purpose of Section 1404(a) was to impart mutuality into the selection of a forum, so that each party would have a part in that selection insofar as the interests of justice were served. (Compare Section 1406(a), where the term "could have been brought." is used instead of "might have been brought." The question of waiver of venue does not arise there.)

6. On p. 11, respondents state that petitioner's construction will facilitate venue shopping. This is purely semantics. The statute as construed by petitioner permits transfer only to a district which has been judicially determined to be one in which under all the circumstances, including plaintiff's preferred right to shop for a forum, the interests of justice will be best served.

7. Respondents' contention at pp. 13 to 14 of their

brief that the Courts of Appeals (other than for the Fift Circuit) have differentiated between a situation wher venue was waived as to all defendants and a situatio where one of the defendants could have been sued in th other district without waiver, is without any basis in fac

While *In re Josephson*, 218 F. (2) 174 (C. A. 1), *Anthon* v. *Kaufman*, 193 F. (2) 85 (C. A. 2), and *Paramoun Pictures, Inc.* v. *Rodney*, 186 F. (2) 111 (C. A. 3), all di involve multiple defendants of whom one or more, but no all, might have been sued in the transferee district, n case was decided on that basis. Each case held that waive of venue was the deciding factor.

In the case of *Torres* v. *Walsh*, 221 F. (2) 319 (C. A. 2) the court found:

> "The only jurisdiction in rem was that of the Distric Court in New York." (p. 320)

This is exactly the opposite of respondents' contentio

Peculiarly enough, while respondents have referred a great length to the decision of Mr. Justice Whittaker, the a district judge, in *General Electric Co.* v. *Central Transi Warehouse Co., et al.*, 127 F. Supp. 817, they do not poin out that while two of the three defendants in that cas could have been sued in the transferee district, the con struction now asserted by respondents was not there lai down.

It is quite apparent that respondents seek to create distinction without a difference, which does not, in fac even exist. Its only importance is that it diverted th Court of Appeals for the Seventh Circuit.[1]

8. Respondents' contention at pp. 15 to 16 that fou Courts of Appeals have adopted its interpretation of Sec

1. *General Casualty Co.* v. *Grubb*, 253 F. (2) 51, could no have been brought in Oklahoma. It was a declaratory judgmen suit for the construction of an insurance policy brought agains Wisconsin residents.

tion 1404(a) is not supported by the cases which they cite. The *Shapiro v. Bonanza Hotel Co.*, in the Ninth Circuit, 185 F. (2) 777, and the *Foster-Milburn Co. v. Knight*, 181 F. (2) 949 (C. A. 2), cases deal merely with the right of plaintiff to seek a transfer to a district where the court did not have venue over the defendant. No question of waiver was involved in these or the other cases cited.

9. We deem it hardly necessary to answer the contention regarding district court decisions raised at p. 17 of respondents' brief. The only one in point is the decision of Mr. Justice Whittaker.

10. The comment of respondents on p. 13 of their brief to the effect that "might have been brought" could not mean "commenced," seems to us to miss the point. Section 1404(a) itself sheds no light upon the zero day upon which "might have been brought" is based. It is quite apparent that zero time *might* be the date of filing of the complaint; or of service; or the day the motion to transfer is filed; or on which the transfer takes effect.

Since Rule 3 of the Rules of Civil Procedure specifies that an action is commenced when the complaint is filed, it would seem that if any point is to be made of the failure to use the word "commenced," in Section 1404(a), it would favor a construction which would prescribe some other zero day than that upon which the complaint is filed. Since this would be a later date, it is not inconsistent to construe the phrase as referring to the date of filing the motion to transfer. On that date, venue having been waived, the suit *might* have been brought *and successfully* prosecuted in the transferee jurisdiction. Before then no question as to transferability arises.

It is not, however, petitioner's purpose to perform a literary autopsy upon the section. As respondents have properly pointed out, petitioner's original opinion in the District Court stated that on a pure basis of literal con-

struction, the ambiguity might well be resolved against his present position. Petitioner, however, properly resolved the ambiguity in accordance with the appropriate rules of statutory construction, and consistent with the remedial purpose of the statute.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

Nos. 25 AND 26.—OCTOBER TERM, 1959.

Honorable Julius J. Hoffman, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, Petitioner, 25 *v.* John F. Blaski, et al.	On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit.
Honorable Philip L. Sullivan, Chief Judge of the United States District Court for the Northern District of Illinois, Petitioner, 26 *v.* Otto Behimer and John A. Roberts.	

[June 13, 1960.]

MR. JUSTICE WHITTAKER delivered the opinion of the Court.

To relieve against what was apparently thought to be the harshness of dismissal, under the doctrine of *forum non conveniens*, of an action brought in an inconvenient one of two or more legally available forums, *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, and concerned by the reach of *Baltimore & Ohio R. Co.* v. *Kepner*, 314 U. S. 44,[1] Congress, in 1948, enacted 28 U. S. C. § 1404 (a), which provides:

"§ 1404. Change of venue

"(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

[1] See the Reviser's Notes following 28 U. S. C. § 1404.

The instant cases present the question whether a District Court, in which a civil action has been properly brought, is empowered by § 1404 (a) to transfer the action, on the motion of the defendant, to a district in which the plaintiff did not have a *right* to bring it.

No. 25, *Blaski.*—Respondents, Blaski and others, residents of Illinois, brought this patent infringement action in the United States District Court for the Northern District of Texas against one Howell and a Texas corporation controlled by him, alleging that the defendants are residents of, and maintain their only place of business in, the City of Dallas, in the Northern District of Texas, where they are infringing respondents' patents. After being served with process and filing their answer, the defendants moved, under § 1404 (a), to transfer the action to the United States District Court for the Northern District of Illinois.[2] Respondents objected to the transfer on the ground that, inasmuch as the defendants did not reside, maintain a place of business, or infringe the patents, in, and could not have been served with process in, the Illinois district, the courts of that district lacked venue over the action [3] and ability to command jurisdiction over the defendants; [4] that therefore

[2] The asserted basis of the motion was that trial of the action in the Illinois District Court would be more convenient to the parties and witnesses and in the interest of justice because several actions involving the validity of these patents were then pending in that court, and that pretrial and discovery steps taken in those actions had developed a substantial amount of evidence that would be relevant and useful in this action.

Defendants also stated in the motion that, if and when the case be so transferred, they would waive all objections to the venue of the Illinois District Court over the action and would enter their appearance in the action in that court.

[3] See 28 U. S. C. § 1400 (b), quoted in note 10, *infra*.

[4] See Rule 4 (f) of the Fed. Rules Civ. Proc., quoted in note 11, *infra*.

that district was not a forum in which the respondents had a right to bring the action, and, hence, the court was without power to transfer it to that district. Without mentioning that objection or the question it raised, the District Court found that "the motion should be granted for the convenience of the parties and witnesses in the interest of justice," and ordered the case transferred to the Illinois district. Thereupon, respondents moved in the Fifth Circuit for leave to file a petition for a writ of mandamus directing the vacation of that order. That court, holding that "[t]he purposes for which § 1404 (a) was enacted would be unduly circumscribed if a transfer could not be made 'in the interest of justice' to a district where the defendants not only waive venue but to which they seek the transfer," denied the motion. *Ex parte Blaski*, 245 F. 2d 737, 738.

Upon receipt of a certified copy of the pleadings and record, the Illinois District Court assigned the action to Judge Hoffman's calendar. Respondents promptly moved for an order remanding the action on the ground that the Texas District Court did not have power to make the transfer order and, hence, the Illinois District Court was not thereby vested with jurisdiction of the action. After expressing his view that the "weight of reason and logic" favored "retransfer of this case to Texas," Judge Hoffman, with misgivings, denied the motion. Respondents then filed in the Seventh Circuit a petition for a writ of mandamus directing Judge Hoffman to reverse his order. After hearing and rehearing, the Seventh Circuit, holding that "[w]hen Congress provided [in § 1404 (a)] for transfer [of a civil action] to a district 'where it might have been brought,' it is hardly open to doubt but that it referred to a district where the plaintiff . . . had a right to bring the case," and that respondents did not have a *right* to bring this action in the Illinois district, granted the writ, one judge dissenting. 260 F. 2d 317.

No. 26, *Behimer.*—Diversity of citizenship then existing, respondents, Behimer and Roberts, residents of Illinois and New York, respectively, brought this stockholders' derivative action, as minority stockholders of Utah Oil Refining Corporation, a Utah corporation, on behalf of themselves and others similarly situated, in the United States District Court for the Northern District of Illinois against Standard Oil Company and Standard Oil Foundation, Inc., Indiana corporations but licensed to do and doing business in the Northern District of Illinois, for damages claimed to have been sustained through the alleged illegal acquisition by defendants of the assets of the Utah corporation at an inadequate price.

After being served with process and filing their answer, the defendants moved, under § 1404 (a), to transfer the action to the United States District Court for the District of Utah.[5] Respondents objected to the transfer on the ground that, inasmuch as the defendants were not incorporated in or licensed to do or doing business in, and could not be served with process in, the district of Utah, the courts of that district lacked venue over the action [6] and ability to command jurisdiction over the defendants; [7] that therefore that district was not a forum in which the

[5] The motion asserted, and the court found, that trial of the action in the district of Utah would be more convenient to the parties and witnesses for the reasons, among others, that all of the officers and directors, and a majority of the minority stockholders, of the Utah corporation reside in that district; that the books and records of the corporation are located in that district; that the substantive law of Utah governs the action, and that the calendar of the Utah court was less congested than the Illinois one.

As part of their motion, defendants stated that, in the event of the transfer of the action as requested, they would waive all objections to the venue of the Utah court and enter appearances in the action in that court.

[6] See 28 U. S. C. § 1391 (c), quoted in note 10, *infra*.

[7] See Rule 4 (f) of the Fed. Rules Civ. Proc., quoted in note 11, *infra*.

respondents had a right to bring the action, and, hence, the court was without power to transfer it to that district. Without mentioning the question raised by that objection, the court found that the proposed transfer would be "for the convenience of the parties and witnesses and in the interest of justice," and ordered the case transferred to the district of Utah.

Respondents then filed in the Seventh Circuit a petition for a writ of mandamus directing the District Court to reverse its order. After hearing, the Seventh Circuit, following its decision in *Blaski* v. *Hoffman*, *supra*, granted the writ. 261 F. 2d 467.

To settle the conflict that has arisen among the circuits respecting the proper interpretation and application of § 1404 (a),* we granted certiorari. 359 U. S. 904.

Without sacrifice or slight of any tenable position, the parties have in this Court commendably narrowed their contentions to the scope of the only relevant inquiry. The points of contention may be sharpened by first observing what is not in contest. Discretion of the dis-

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* The decisions of the circuits are in great conflict and confusion. The Second Circuit has held one way on a *plaintiff's* motion and the other on a *defendant's* motion. Compare *Foster-Milburn Co.* v. *Knight*, 181 F. 2d 949, 952–953, with *Anthony* v. *Kaufman*, 193 F. 2d 85, and *Torres* v. *Walsh*, 221 F. 2d 319. The Fifth Circuit, too, has held both ways. Compare *Blackmar* v. *Guerre*, 190 F. 2d 427, 429, with *Ex parte Blaski*, 245 F. 2d 737. The Ninth Circuit has held a District Court to be without power to transfer an action, on *plaintiff's* motion, to a district in which plaintiff did not have a legal right to bring it originally. *Shapiro* v. *Bonanza Hotel Co.*, 185 F. 2d 777, 780. The Third Circuit has held, two of the five judges dissenting, that a District Court has power to transfer an action, on *defendant's* motion, to a district in which the plaintiff did not have a legal right to bring it. *Paramount Pictures, Inc.*, v. *Rodney*, 186 F. 2d 111. The First Circuit has upheld transfer, on *defendant's* motion, to a district in which venue existed but where process could not be served on defendants (but defendants had been served in the transferor district). *In re Josephson*, 218 F. 2d 174.

trict judges concerned is not involved. Propriety of the remedy of mandamus is not assailed. No claim is made here that the order of the Fifth Circuit denying the motion of respondents in the *Blaski* case for leave to file a petition for writ of mandamus, 245 F. 2d 737, precluded Judge Hoffman or the Seventh Circuit from remanding that case.[9] Petitioners concede that these actions were properly brought in the respective transferor forums; that statutory venue did not exist over either of these actions

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[9] That order did not purport to determine the jurisdiction of the transferee court and therefore did not preclude Judge Hoffman of power to determine his own jurisdiction, nor did it preclude the power of the Seventh Circuit to review his action. *Fettig Canning Co.* v. *Steckler*, 188 F. 2d 715 (C. A. 7th Cir.); *Wilson* v. *Kansas City Southern R. Co.*, 101 F. Supp. 56 (D. C. W. D. Mo.); *United States* v. *Reid*, 104 F. Supp. 260, 266 (D. C. E. D. Ark.). Several reasons why principles of *res judicata* do not apply may be stated in a few sentences. The orders of the Texas and Illinois District Courts on the respective motions to transfer and to remand, like the orders of the Fifth and Seventh Circuits on the respective petitions for mandamus, were (1) interlocutory, (2) not upon the merits, and (3) were entered in the same case by courts of coordinate jurisdiction. Here the sole basis of the right of the Fifth Circuit to entertain the petition for a writ of mandamus was to protect its appellate jurisdiction, 28 U. S. C. § 1651 (a); *Magnetic Engineering & Mfg. Co.* v. *Dings Mfg. Co.*, 178 F. 2d 866, 869–870 (C. A. 2d Cir.); *Foster-Milburn Co.* v. *Knight*, 181 F. 2d 949, 951 (C. A. 2d Cir.); *In re Josephson*, 218 F. 2d 174, 177 (C. A. 1st Cir.); *Torres* v. *Walsh*, 221 F. 2d 319, 321 (C. A. 2d Cir.) and, by denying leave to file the petition, it forsook such right, but it did not thereby determine that the Illinois District Court had jurisdiction of the action. The question of that court's jurisdiction still remained subject to attack as of right on appeal to the Seventh Circuit from any final judgment in the action. When, therefore, jurisdiction of the District Court was assailed in the Seventh Circuit, by the petition for mandamus, that court surely had power to determine whether it would hold, on such an appeal, that the Illinois District Court did or did not have jurisdiction of the action and, if not, to say so and thus avoid the delays and expense of a futile trial.

in the respective transferee districts,[10] and that the respective defendants were not within the reach of the process of the respective transferee courts.[11] They concede, too, that § 1404 (a), being "not unlimited," "may be utilized only to direct an action to any other district or division 'where it might have been brought,'" and that, like the superseded doctrine of *forum non conveniens*, *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 507, the statute requires "an alternative forum in which plaintiff might proceed."

Petitioners' "thesis" and sole claim is that § 1404 (a), being remedial, *Ex parte Collett*, 337 U. S. 55, 71, should be broadly construed, and, when so construed, the phrase "where it might have been brought" should be held to relate not only to the time of the bringing of the action, but also to the time of the transfer; and that "if at such time the transferee forum has the power to adjudicate the

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[10] Venue over patent infringement actions is prescribed by 28 U. S. C. § 1400 (b) which provides:

"(b) Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business."

See *Stonite Prod. Co.* v. *Melvin Lloyd*, 315 U. S. 561; *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U. S. 222.

General venue over actions against corporations is prescribed by 28 U. S. C. § 1391 (c), which provides:

"(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

[11] General provisions respecting service of the process of federal courts are prescribed by Rule 4 (f) of the Fed. Rules Civ. Proc., which provides:

"(f) Territorial limits of effective service.

"All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state. A subpoena may be served within the territorial limits provided in Rule 45."

issues of the action, it is a forum in which the action might *then* have been brought." (Emphasis added.) [12] They argue that in the interim between the bringing of the action and the filing of a motion to transfer it, the defendants may move their residence to, or, if corporations, may begin the transaction of business in, some other district, and, if such is done, the phrase "where it might have been brought" should be construed to empower the District Court to transfer the action, on motion of the defendants, to such other district; and that, similarly, if, as here, the defendants move to transfer the action to some other district and consent to submit to the jurisdiction of such other district, the latter district should be held one "in which the action might *then* have been brought." (Emphasis added.)

We do not agree. We do not think the § 1404 (a) phrase "where it might have been brought" can be interpreted to mean, as petitioners' theory would require, "where it may now be rebrought, with defendants' consent." This Court has said, in a different context, that § 1404 (a) is "unambiguous, direct [and] clear," *Ex parte Collett*, 337 U. S., at 58, and that "the unequivocal words of § 1404 (a) and the legislative history . . . establishes that Congress indeed meant what it said." *United States* v. *National City Lines, Inc.*, 337 U. S. 78, 84. Like the Seventh Circuit, 260 F. 2d, at 322, we think the dissenting opinion of Judges Hastie and McLaughlin in *Paramount Pictures, Inc.*, v. *Rodney*, 186 F. 2d 111 (C. A. 3d Cir.) correctly answered this contention:

> "But we do not see how the conduct of a defendant after suit has been instituted can add to the forums where 'it might have been brought.' In the normal

[12] A similar view was expressed in *Paramount Pictures, Inc.*, v. *Rodney*, 186 F. 2d 111 (C. A. 3d Cir.). The court there thought that the § 1404 (a) phrase "might have been brought" means "could now be brought." *Id.*, at 114.

meaning of words this language of § 1404 (a) directs the attention of the judge who is considering a transfer to the situation which existed when suit was instituted."

It is not to be doubted that the transferee courts, like every District Court, had jurisdiction to entertain actions of the character involved, but it is obvious that they did not acquire jurisdiction over these particular actions when they were brought in the transferor courts. The transferee courts could have acquired jurisdiction over these actions only if properly brought in those courts, or if validly transferred thereto under § 1404 (a). Of course, venue, like jurisdiction over the person, may be waived. A defendant, properly served with process by a court having subject matter jurisdiction, waives venue by failing seasonably to assert it, or even simply by making default. *Commercial Ins. Co.* v. *Stone Co.*, 278 U. S. 177, 179–180; *Neirbo Co.* v. *Bethlehem Ship Building Corp., Ltd.*, 308 U. S. 165. But the power of a District Court under § 1404 (a) to transfer an action to another district is made to depend not upon the wish or waiver of the defendant but, rather, upon whether the transferee district was one in which the action "might have been brought" by the plaintiff.

The thesis urged by petitioners would not only do violence to the plain words of § 1404 (a), but would also inject gross discrimination. That thesis, if adopted, would empower a District Court, upon a finding of convenience, to transfer an action to any district desired by the *defendants* and in which they were willing to waive their statutory defenses as to venue and jurisdiction over their persons, regardless of the fact that such transferee district was not one in which the action "might have been brought" by the plaintiff. Conversely, that thesis would not permit the court, upon motion of the *plaintiffs* and a like showing of convenience, to transfer the action to

the same district, without the consent and waiver of venue and personal jurisdiction defenses by the defendants. Nothing in § 1404 (a), or in its legislative history, suggests such a unilateral objective and we should not, under the guise of interpretation, ascribe to Congress any such discriminatory purpose.

We agree with the Seventh Circuit that:

> "If when a suit is commenced, plaintiff has a right to sue in that district, independently of the wishes of defendant, it is a district 'where [the action] might have been brought.' If he does not have that right, independently of the wishes of defendant, it is not a district 'where it might have been brought,' and it is immaterial that the defendant subsequently [makes himself subject, by consent, waiver of venue and personal jurisdiction defenses or otherwise, to the jurisdiction of some other forum]." 260 F. 2d, at 317 and 261 F. 2d, at 469.

Inasmuch as the respondents (plaintiffs) did not have a right to bring these actions in the respective transferee districts, it follows that the judgments of the Court of Appeals were correct and must be

Affirmed.

MR. JUSTICE STEWART, concurring in No. 25.

Two Courts of Appeals disagreed about the meaning of a federal law, as conscientious federal courts sometimes do. From the point of view of efficient judicial administration the resulting history of this litigation is no subject for applause. But, as the Court points out, no claim was made here that the decision of the Fifth Circuit precluded Judge Hoffman or the Seventh Circuit from remanding the case, and on the merits of that question I agree with the Court that principles of *res judicata* were inapplicable. In any event, the conflict between the Circuits is now resolved, and what happened here will not happen again.

SUPREME COURT OF THE UNITED STATES

No. 25.—October Term, 1959.

Honorable Julius J. Hoffman, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, Petitioner, *v.* John F. Blaski, et al.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 13, 1960.]

Mr. Justice Frankfurter, whom Mr. Justice Harlan and Mr. Justice Brennan join, dissenting.

My special disagreement with the Court in this case concerns a matter of judicial administration arising out of the fact that after the question on the merits had been considered by the Court of Appeals for the Fifth Circuit, the same question between the same parties was later independently again adjudicated by the Court of Appeals for the Seventh Circuit. I cannot join the Court's approval of the right of the Seventh Circuit to make such a re-examination. It is true that in its opinion in this case and No. 26, *Sullivan* v. *Behimer*, decided today, the Court settles the question over which the two Courts of Appeals disagreed, so that it should not recur. This is not, however, an isolated case. A general principle of judicial administration in the federal courts is at stake. In addition, while the Court today settles one problem arising in the application of § 1404 (a), other questions involving that section may readily give rise to conflicting views among the eleven Courts of Appeals. Under the Court's opinion, for example, transfer always depends upon the meaning of the federal venue statutes, and upon the jurisdiction of the transferee court over the person of

the defendant, which may be a problem of constitutional dimensions, and there is obviously a substantial opportunity for conflict between the Courts of Appeals over those matters. We ought to forestall in other situations of potential controversy the kind of judicial unseemliness which this case discloses.

Plaintiffs brought this action for patent infringement in the United States District Court for the Northern District of Texas. Defendants moved pursuant to 28 U. S. C. § 1404 (a) to have it transferred to the Northern District of Illinois. Finding transfer to be "for the convenience of parties and witnesses, in the interest of justice," the Texas District Court granted the motion and transferred the action to Illinois. Plaintiffs sought a writ of mandamus in the Court of Appeals for the Fifth Circuit to require the Texas District Court to set aside the transfer. In plaintiffs' view the Northern District of Illinois was not a place where the action "might have been brought," and thus the Texas District Court had no power to transfer the action there under § 1404 (a). The Fifth Circuit fully examined the merits of this claim and rejected it, holding that in the circumstances before the court the Northern District of Illinois was a jurisdiction where the action "might have been brought." Leave to file a mandamus petition was therefore denied, and the action was duly transferred. 245 F. 2d 737.

Upon the assignment of the action to the calendar in the Northern District of Illinois plaintiffs moved that court to disregard the explicit decision of another District Court in the same case, sustained by the appropriate Court of Appeals, and to send the case back to Texas. Plaintiffs advanced precisely the claim already rejected by the Fifth Circuit, namely, that the Northern District of Illinois was not a place where the action "might have been brought" within the proper meaning of § 1404 (a). Transfer had, in their view, erroneously been ordered by

the Texas District Court and the power to transfer erroneously approved by the Fifth Circuit. Plaintiffs' application was denied by the Illinois District Court. Still not accepting the decision against them, plaintiffs again sought an appellate remedy by way of mandamus, this time in the Court of Appeals for the Seventh Circuit. Initially, mandamus was denied. On rehearing, however, the Seventh Circuit held that the prior decision of the Fifth Circuit was wrong. It held that § 1404 (a) did not authorize transfer to Illinois, and it ordered the action "remanded" to the Texas District Court within the Fifth Circuit, from whence it had come, to go forward there. 260 F. 2d 317. That "remand" is the order which is here on certiorari. 359 U. S. 904.

The Court of Appeals for the Seventh Circuit has thus refused to permit an Illinois District Court to entertain an action transferred to it with the approval, after full consideration of the problem involved, of the Court of Appeals for the Fifth Circuit. The Seventh Circuit considered no evidence not before the Fifth Circuit in so deciding. It considered precisely the same issue and reached a contrary legal conclusion. This was after explicit prior adjudication of the question at the same level of the federal system in the same case and between the same parties. Because the question involved is the transferability of the action, the consequence of the Seventh Circuit's disregard for the Fifth Circuit's prior decision is not only that a question once decided has been reopened, with all the wasted motion, delay and expense which that normally entails. Unless and until this Court acts, the litigants have no forum in which trial may go forward. Each Court of Appeals involved has refused to have the District Court in its Circuit hear the case and has sent it to a District Court in the other.

This is the judicial conduct the Court now approves. The Court does not suggest that the Court of Appeals

for the Fifth Circuit was powerless, was without jurisdiction, to review, as it did, the question of the applicability of § 1404 (a) to this case. The occasion for the Fifth Circuit's review by way of mandamus may have been, as the Court suggests, "to protect its appellate jurisdiction" but there can be no question that the Fifth Circuit undertook to and did resolve on its merits the controversy between the parties regarding the meaning of § 1404 (a). Yet the Court decides that the review in the Fifth Circuit was so much wasted motion, properly ignored by the Court of Appeals for the Seventh Circuit in arriving at a contrary result. The case is treated just as if the Fifth Circuit had never considered the questions involved in it. I am at a loss to appreciate why all the considerations bearing on the good administration of justice which underlie the technical doctrine of *res judicata* did not apply here to require the Court of Appeals for the Seventh Circuit to defer to the previous decision. "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause." *Baldwin* v. *Traveling Men's Assn.*, 283 U. S. 522, 525–526. One would suppose that these considerations would be especially important in enforcing comity among federal courts of equal authority.

The fact that the issue involved is the propriety of a transfer of the action only makes the case for deference to the previous decision of a coordinate court in the same litigation that much stronger. The course of judicial action now approved by the Court allows transfer over

a persisting objection only when concurred in by two sets of courts: those in the place where the case begins, and those in the place to which transfer is ordered. Not only does the place of trial thus remain unsettled for an unnecessarily long time to accommodate double judicial consideration, but, as this case shows, the result of a disagreement between the courts involved is that the litigation cannot go forward at all unless this Court resolves the matter. Surely a seemly system of judicial remedies, especially appellate judicial remedies, regarding controverted transfer provisions of the United States Code should encourage, not discourage, quick settlement of questions of transfer and should preclude two Courts of Appeals from creating, through their disagreement in the same case, an impasse to the litigation which only this Court can remove. Section 1404 (a) was meant to serve the ends of "convenience" and "justice" in the trial of actions. It perverts those ends to permit a question arising under § 1404 (a), as here, to be litigated, in turn, before a District Court and Court of Appeals in one Circuit, and a District Court and Court of Appeals in another Circuit, one thousand miles distant, thereby delaying trial for a year and a half, only to have the result of all that preliminary litigation be that trial may not go forward at all until this Court shall settle the question of where it shall go forward, after at least another year's delay.

We are not vouchsafed claims of reason or of the due administration of justice that require the duplication of appellate remedies approved by the Court in this case. Why is not a single judicial appellate remedy in a Court of Appeals entirely adequate for one aggrieved by a transfer? Once the Court of Appeals for the Fifth Circuit had decided, after due consideration, that the proper meaning of § 1404 (a) included Illinois as a place where the action "might have been brought," this should have ended the

matter, except of course for this Court's power of review of that decision through the writ of certiorari, a power which we declined to exercise in this case. Nor does such a view of right and wise judicial administration depend upon the nature of the procedural or even jurisdictional issue in controversy. Technical *res judicata* controls even a decision on a matter of true jurisdiction. "We see no reason why a court, in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination in an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation." *Stoll* v. *Gottlieb*, 305 U. S. 165, at 172. See also *Baldwin* v. *Traveling Men's Assn.*, *supra*, 283 U. S. 522. Surely, a prior decision of a federal court on the unfundamental issue of venue ought to receive similar respect from a coordinate federal court when the parties and the facts are the same. The question is of the appropriate scheme of judicial remedies for enforcing rights under a federal remedial statute aimed at enhancing the fair administration of justice in the federal courts. It is not consonant with reason to permit a duplicate appellate procedure for questions under this statute, thereby forestalling final decision on a pre-trial matter which ought to be decided as expeditiously as possible, causing wasteful delay and expense, and thus depriving the statutory motion to transfer of effectiveness in achieving the ends of "convenience" and "justice" for which it was created.

SUPREME COURT OF THE UNITED STATES

No. 26.—October Term, 1959.

Honorable Philip L. Sullivan, Chief Judge of the United States District Court for the Northern District of Illinois, Petitioner, v. Otto Behimer and John A. Roberts.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 13, 1960.]

Mr. Justice Frankfurter, whom Mr. Justice Harlan and Mr. Justice Brennan join, dissenting.

The problem in this case is of important concern to the effective administration of justice in the federal courts. At issue is the scope of 28 U. S. C. § 1404 (a), providing for the transfer of litigation from one Federal District Court to another. The main federal venue statutes necessarily deal with classes of cases, without regard to the occasional situation in which a normally appropriate venue may operate vexatiously. Section 1404 (a) was devised to avoid needless hardship and even miscarriage of justice by empowering district judges to recognize special circumstances calling for special relief. It provides that an action, although begun in a place falling within the normally applicable venue rubric may be sent by the District Court to go forward in another district much more appropriate when judged by the criteria of judicial justice.

The terms of § 1404 (a) are as follows:

> "For the convenience of parties and witnesses in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

The part of § 1404 (a) the meaning of which is at issue here is its last phrase; "any other district or division where it [the action] might have been brought." The significance of this phrase is this: even though a place be found to be an overwhelmingly more appropriate forum from the standpoint of "convenience" and "justice," the litigation may not be sent to go forward there unless it is a place where the action "might have been brought." Upon the scope to be given this phrase thus depends almost entirely the effectiveness of § 1404 (a) to insure an appropriate place of trial, when the action is begun in an oppressive forum.

One would have to be singularly unmindful of the treachery and versatility of our language to deny that as a mere matter of English the words "where it might have been brought," may carry more than one meaning. For example, under Rule 3 of the Federal Rules of Civil Procedure, civil actions are "commenced" by filing a complaint with the court. As a matter of English there is no reason why "commenced" so used should not be thought to be synonymous with "brought" as used in § 1404 (a), so that an action "might have been brought" in any district where a complaint might have been filed, or perhaps only in districts with jurisdiction over the subject matter of the litigation. As a matter of English alone, the phrase might just as well be thought to refer either to those places where the defendant "might have been" served with process, or to those places where the action "might have been brought" in light of the applicable venue provision, for those provisions speak generally of where actions "may be brought." Or the phrase may be thought as a matter of English alone to refer to those places where the action "might have been brought" in light of the applicable statute of limitations, or other provisions preventing a court from reaching the merits of the litigation. On the face of its words alone the phrase

may refer to any one of these considerations, *i. e.*, venue, amenability to service, or period of limitations, to all of them or to none of them, or to others as well. And to the extent that these are matters which may or may not be raised at the defendant's election, the English of the phrase surely does not tell whether the defendant's actual or potential waiver or failure to raise such objections is to be taken into account in determining whether a district is one in which the action "might have been brought," or whether the phrase refers only to those districts where the plaintiff "might have brought" the action even over a timely objection on the part of the defendant, that is, where he had "a right" to bring it.

The particular problem in the present case has been a relatively commonplace one in the application of § 1404 (a),[1] and it demonstrates the failure of the words of the section, considered merely as words, to define with precision those places where an action "might have been brought." The problem here is this. Action was brought by plaintiff in district A, a proper venue under the appli-

[1] *See, e. g., Felchin* v. *American Smelting & Refining Co.*, 136 F. Supp. 577 (D. C. S. D. Calif. 1955) (transfer denied on defendant's motion because plaintiff was an executor not qualified in transferee court); *Masterpiece Products, Inc.*, v. *United Artists Corp.*, 90 F. Supp. 750 (D. C. E. D. Pa. 1950) (transfer denied on defendant's motion because, had the action originally been brought in the transferee court, the alignment of parties would have been different, there being one involuntary party, thereby destroying complete diversity of citizenship); *Lucas* v. *New York Central R. Co.*, 88 F. Supp. 536 (D. C. S. D. N. Y. 1950) (transfer denied on defendant's motion because defendant's corporate status would have destroyed diversity of citizenship had the action been brought in the transferee court). In all of these cases transfer was denied because the transferee court was deemed not to be one where the action "might have been brought." See also *Arvidson* v. *Reynolds Metal Co.*, 107 F. Supp. 51 (D. C. W. D. Wash. 1952) (denying the defendant's motion for transfer in part because the action was a local one, and state courts in the transferee district would not have taken jurisdiction over it).

cable venue statute. Defendant objected and moved for transfer to district B, submitting that in the interests of "convenience" and "justice" to all concerned the action should go forward there instead of in district A. District B, however, is one in which, had the complaint been filed there, the plaintiff would have been unable without the defendant's consent to serve him with process. In addition, the defendant would have had in district B, had the complaint been filed there, an objection to the venue under the applicable venue statute. In moving for transfer to B, the defendant stipulates to waiving all objections to venue there and to submitting his person to the jurisdiction of District Court B, should transfer be ordered. The District Court in A agrees that B, not A, is the appropriate place for trial and is disposed to transfer the action there, for in light of the defendant's stipulation there is no way in which the plaintiff can be prejudiced by the lack of venue in B or the impossibility, as an original matter, of serving defendant there. Is B a place where the action "might have been brought" so that the transfer can be effected? The Court finds it "plain," from the words of the phrase themselves, that B is not such a place, and that, for it, is the end of the matter.

We would all agree that B would be a place where the action "might have been brought" if it were a place of statutory venue, if the defendant had always been amenable to process there, and if B had no other special characteristics whereby the defendant could prevent consideration there of the merits of the cause of action. Almost every statute has a core of indisputable application, and this statute plainly applies to permit transfer to a place where there could never have been any objection to the maintenance of the action. But is it clear, as the Court would have it, that, as a mere matter of English,

because potential objections peculiar to the forum would have been present in B, it is not to be deemed a place where the action "might have been brought," although defendant not only might but is prepared to waive, as he effectively may, such objections?

I submit that it is not clear from the words themselves, and the experience in the lower courts gives compelling proof of it. At least 28 District Courts, located in all parts of the Nation, have had to give concrete meaning to the set of words in controversy. These are the judges who are, to use a familiar but appropriate phrase, on the firing line, who are in much more intimate, continuous touch with the needs for the effective functioning of the federal judicial system at the trial level than is this Court. They have not found the last phrase of § 1404 (a) unambiguous. There has been anything but the substantial uniformity of views to be expected in the application of a clear and unambiguous direction. There have been severe differences with regard to whether § 1404 (a) is ever available as a remedy to a plaintiff forced into an inconvenient forum, and if so under what conditions.[2] With regard to defendants' motions to transfer it has been held that "brought" in § 1404 (a) is synonymous with "commenced" in Rule 3 so that transfer may be made to virtually any district dictated by "convenience" and "jus-

[2] *See, e. g., Dufek* v. *Roux Distrib. Co.*, 125 F. Supp. 716 (D. C. S. D. N. Y. 1954); *Barnhart* v. *Rogers*, 86 F. Supp. 595 (D. C. N. D. Ohio 1949); *Troy* v. *Poorvu*, 132 F. Supp. 864 (D. C. Mass. 1955); *United States* v. *Reid*, 104 F. Supp. 260 (D. C. E. D. Ark. 1952); *Otto* v. *Hirl*, 89 F. Supp. 72 (D. C. S. D. Iowa 1952); *McGee* v. *Southern Pacific Co.*, 151 F. Supp. 338 (D. C. S. D. N. Y. 1957); *Rogers* v. *Halford*, 107 F. Supp. 295 (D. C. E. D. Wisc. 1952); *Herzog* v. *Central Steel Tube Co.*, 98 F. Supp. 607 (D. C. S. D. Iowa 1951); *Mitchell* v. *Gundlach*, 136 F. Supp. 169 (D. C. Md. 1955); *McCarley* v. *Foster-Milburn Co.*, 89 F. Supp. 643 (D. C. W. D. N. Y. 1950).

tice." [3] It has been held that the phrase is to be applied as if it read "where it might have been brought *now*," thus giving full effect to a waiver of objections by defendant in moving for transfer.[4] It has been said, on the other hand, that "[s]ection 1404 (a) . . . contemplates statutory venue and not consent venue." [5]

With regard to the particular problem in this case, which has arisen most often, a majority of the District Courts which have considered the problem have ruled against the Court's "plain" meaning of the statute. At least seven District Courts have ruled that, because of the defendant's consent to have the action go forward there, a district is one where the action "might have been brought," even though it is a place where the defendant might either have objected to the venue, or avoided process, or both had the action been brought there originally.[6] At least three District Courts have held or implied to the contrary, that the defendant's consent is not relevant, and that such a district cannot be one where the action "might have been brought." [7] Two others have

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[3] *Otto* v. *Hirl*, 89 F. Supp. 72, 74 (D. C. S. D. Iowa 1952).

[4] *Cain* v. *Bowater's Newfoundland Pulp & Paper Mills, Ltd.*, 127 F. Supp. 949, 950 (D. C. E. D. Pa. 1954).

[5] *Johnson* v. *Harris*, 112 F. Supp. 338, 341 (D. C. E. D. Tenn. 1953).

[6] *Hill* v. *Upper Mississippi Towing Corp.*, 141 F. Supp. 692 (D. C. Minn. 1956); *McGee* v. *Southern Pacific Co.*, 151 F. Supp. 338 (D. C. S. D. N. Y. 1957); *Welch* v. *Esso Shipping Co.*, 112 F. Supp. 611 (D. C. S. D. N. Y. 1953); *Mire* v. *Esso Shipping Co.*, 112 F. Supp. 612 (D. C. S. D. N. Y. 1953); *Cain* v. *Bowater's Newfoundland Pulp & Paper Mills, Ltd.*, 127 F. Supp. 949 (D. C. E. D. Pa. 1954); *Anthony* v. *RKO Radio Pictures*, 103 F. Supp. 56 (D. C. S. D. N. Y. 1951); *Blaski* v. *Howell* (D. C. N. D. Ill.; March 14, 1958).

[7] *General Electric Co.* v. *Central Transit Warehouse Co.*, 127 F. Supp. 817 (D. C. W. D. Mo. 1955); *Tivoli Realty* v. *Paramount Pictures*, 89 F. Supp. 278 (D. C. Del. 1950); *Felchin* v. *American Smelting & Refining Co.*, 136 F. Supp. 577 (D. C. S. D. Calif. 1955). See also *Johnson* v. *Harris*, 112 F. Supp. 338 (D. C. E. D. Tenn. 1953) (dictum).

simply denied motions by the defendant on the ground that the transferee court was not one where the action "might have been brought," without discussing whether in moving for transfer the defendant had consented to go forward in the transferee court, or what the effect of that consent would be.[8] Two District Courts have granted the defendants motion to transfer, making the matter turn on the presence of a number of defendants and the fact that some of them were suable as of right in the transferee court.[9] Two others have found the amenability of the defendant to service of process in the place to which transfer is proposed to be wholly irrelevant to whether the action "might have been brought" there, and have ordered transfer to such a place on the plaintiff's motion even though the defendant did not consent.[10] It simply cannot be said in the face of this experience that the words of the statute are so compellingly precise, so unambiguous, that § 1404 (a) as a matter of "plain words" does not apply in the present case.

The experience in the Courts of Appeals is also revealing. Of the six cases where defendants have moved for transfer, in only two has it been held that the defendant's consent to the transfer is not relevant in determining whether the place to which transfer is proposed is a place where the action "might have been brought," and these are the two decisions of the Seventh Circuit now before us.

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[8] *Silbert* v. *Nu-Car Carriers*, 111 F. Supp. 357 (D. C. S. D. N. Y. 1953); *Hampton Theaters, Inc.*, v. *Paramount*, 90 F. Supp. 645 (D. C. D. C. 1950). See also *Arvidson* v. *Reynolds Metal Co.*, 107 F. Supp. 51 (D. C. W. D. Wash. 1952) (denying the defendants' motion to transfer in part because the plaintiff would not have been amenable to process in the transferee court).

[9] *Fergeson* v. *Ford Motor Co.*, 89 F. Supp. 45 (D. C. S. D. N. Y. 1950); *Glasfloss Corp.* v. *Owens-Corning Fiberglas Corp.*, 90 F. Supp. 967 (D. C. S. D. N. Y. 1950).

[10] *McCarley* v. *Foster-Milburn Co.*, 89 F. Supp. 643 (D. C. W. D. N. Y. 1950); *Troy* v. *Poorvu*, 132 F. Supp. 864 (D. C. Mass. 1955).

Blaski v. *Hoffman*, 260 F. 2d 317 (C. A. 7th Cir. 1958); *Behimer* v. *Sullivan*, 261 F. 2d 467 (C. A. 7th Cir. 1958). The Third Circuit has ruled in favor of transfer on the defendant's motion to a place where the defendant might have objected to the venue. *Paramount Pictures* v. *Rodney*, 186 F. 2d 111 (C. A. 3d Cir. 1951). The First and Second Circuits have ruled in favor of transfer on defendant's motion to a place where the defendant could not have been served with process. *Torres* v. *Walsh*, 221 F. 2d 319 (C. A. 2d Cir. 1955); *In re Josephson*, 218 F. 2d 174 (C. A. 1st Cir. 1954). And the Second and Fifth Circuits have ruled in favor of transfer on defendant's motion to a place where there was neither statutory venue nor a chance to serve the defendant. *Anthony* v. *Kaufman*, 193 F. 2d 85 (C. A. 2d Cir. 1951); *Ex parte Blaski*, 245 F. 2d 737 (C. A. 5th Cir. 1957). All these courts have considered the meaning of the phrase in detail and have held that the place to which transfer was proposed was a place where the action "might have been brought." Thus the Court's view of the meaning of § 1404 (a) is contrary to the rulings of every Court of Appeals but one which has considered the problem, and is contrary to the view of more than half the District Courts as well. Yet the Court maintains that the statute unambiguously means what its says it does.

Surely, the Court creates its own verbal prison in holding that "the plain words" of § 1404 (a) dictate that transfer may not be made in this case although transfer concedely was in the interest of "convenience" and "justice." Moreover, the Court, while finding the statutory words "plain," decides the case by applying, not the statutory language, but a formula of words found nowhere in the statute, namely, whether plaintiffs had "a right to bring these actions in the respective transferee districts." This is the Court's language, not that of Congress. Although it is of course a grammatically plausible inter-

pretation of the phrase "where it might have been brought," it has been, I submit, established that it is not by any means the only plausible interpretation. In fact, the Court's rephrasing, as distinguished from Congress' phrasing, gives the narrowest possible scope to the operation of § 1404 (a). There can be expected to be very few, if any, alternative forums in a given case where the plaintiff has a "right" to sue, considering that that means places of unobjectionable venue where the defendant is amenable to service of process and where there are no other impediments such as a statute of limitations which the defendant can rely on to defeat the action.

This case, then, cannot be decided, and is not decided, by the short way of a mechanical application of Congress' words to the situation. Indeed, it would be extraordinary if a case which could be so decided were deemed worthy of this Court's attention twelve years after the applicable statute was enacted. To conclude, as the Court does, that the transferee court is inexorably designated by the inherent force of the words "where it might have been brought" is to state a conclusion that conceals the process by which the meaning is, as a matter of choice, extracted from the words.

The problem in this case is one of resolving an ambiguity by all the considerations relevant to resolving an ambiguity concerning the conduct of litigation, and more particularly the considerations that are relevant to resolving an ambiguous direction for the fair conduct of litigation in the federal judicial system. At the crux of the business, as I see it, is the realization that we are concerned here not with a question of a limitation upon the power of a federal court but with the place in which that court may exercise its power. We are dealing, that is, not with the jurisdiction of the federal courts, which is beyond the power of litigants to confer, but with the locality of a lawsuit, the rules regulating which are designed mainly

for the convenience of the litigants. "[T]he locality of a law suit—the place where judicial authority may be exercised—though defined by legislation relates to the convenience of litigants and as such is subject to their disposition. . . . '[A venue statute] 'merely accords to the defendant a personal privilege respecting the venue, or place of suit, which he may assert, or may waive, at his election.' *Commercial Ins. Co.*, v. *Stone Co.*, 278 U. S. 177, 179." *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 168. And in that case the Court was merely reiterating considerations already forcefully set out in *General Investment Co.* v. *Lake Shore R. Co.*, 260 U. S. 261, and *Lee* v. *Chesapeake R. Co.*, *id.*, 653. This basic difference "between the court's power and the litigant's convenience is historic in the federal courts." 308 U. S., at 168.

Applying these considerations to a problem under a different statute but relevant to the present one, namely, whether removal from a state court to a federal court might be had upon the motion of the defendant when the federal court was one where the venue would have been subject to objection, had the action originally been brought there, this Court, speaking unanimously through Mr. Justice Van Devanter, discriminatingly reminded that "[i]t cannot be affirmed broadly that this suit could not have been brought . . . [in the federal court] but only that it could not have been brought and maintained in that court over a seasonable objection by the company to being sued there." This analysis has striking application to the present problem under § 1404 (a), and it is also relevant here that the Court sanctioned removal in that case to a federal court with no statutory venue, partly because "there could be no purpose in extending to removals the personal privilege accorded to defendants by [the venue statutes] . . . since removals are had only

at the instance of defendants." *General Investment Co.* v. *Lake Shore R. Co.*, 260 U. S. 261, 273, 275. See also, to the same effect, *Lee* v. *Chesapeake R. Co.*, *id.*, 653, overruling *Ex parte Wismer*, 303 U. S. 449, and qualifying *In re Moore*, 209 U. S. 490. The rule that statutory venue rules governing the place of trial do not affect the power of a federal court to entertain an action, or of the plaintiff to bring it, but only afford the defendant a privilege to object to the place chosen, is now enacted as part of the Judicial Code. 28 U. S. C. § 1406 (b). And of course it needs no discussion that a defendant is always free voluntarily to submit his person to the jurisdiction of a federal court.

In light of the nature of rules governing the place of trial in the federal system, as thus expounded and codified, as distinguished from limitation upon the power of the federal courts to adjudicate, what are the competing considerations here? The transferee court in this case plainly had and has jurisdiction to adjudicate this action with the defendant's acquiescence. As the defendant, whose privilege it is to object to the place of trial, has moved for transfer, and has acquiesced to going forward with the litigation in the transferee court, it would appear presumptively, unless there are strong considerations otherwise, that there is no impediment to effecting the transfer so long as "convenience" and "justice" dictate that it be made. It does not counsel otherwise that here the plaintiff is to be sent to a venue to which he objects, whereas ordinarily, when the defendant waives his privilege to object to the place of trial, it is to acquiesce in the plaintiff's choice of forum. This would be a powerful argument if, under § 1404 (a), a transfer were to be made whenever requested by the defendant. Such is not the case, and this bears emphasis. A transfer can be made under § 1404 (a) to a place where the action "might have been brought" only when "convenience" and "justice" so

dicate, not whenever the defendant so moves. A legitimate objection by the plaintiff to proceeding in the transferee forum will presumably be reflected in a decision that the interest of justice does not require the transfer, and so it becomes irrelevant that the proposed place of transfer is deemed one where the action "might have been brought." If the plaintiff's objection to proceedings in the transferee court is not consonant with the interests of justice, a good reason is wanting why the transfer should not be made.

On the other hand, the Court's view restricts transfer, when concededly warranted in the interest of justice, to protect no legitimate interest on the part of the plaintiff. And by making transfer turn on whether the defendant could have been served with process in the transferee district on the day the action was brought, the Court's view may create difficult problems in ascertaining that fact, especially in the case of non-corporate defendants. These are problems which have no conceivable relation to the proper administration of a provision meant to assure the most convenient and just place for trial.

Nor is it necessary to reach the Court's result in order to preserve an appropriate meaning for the phrase "where it might have been brought." I fully agree that the final words of § 1404 (a) are words of limitation upon the scope of the provision. But to hold as I would that a district is one where the action "might have been brought" when the defendant consents to going forward with the litigation there, does not remove the quality of those words as a limitation. The words compel the defendant in effect to waive any objections to going forward in the transferee district which he might have had had the action been brought there, in order to obtain a transfer. The words therefore insure that transfer will not be a device for doing the plaintiff out of any forum in which to proceed.

no matter how inconvenient. The words in any case, plainly limit the plaintiff's right to seek a transfer when the defendant does not consent to the change of venue. Moreover, the words may serve to prevent transfer to courts with a lack of federal power to adjudicate the matter of the dispute which the defendant cannot confer with his consent.[11] In light of the fact that the venue statutes in Title 28, U. S. C., are phrased in terms of where the action "may be brought," or in some cases where it "shall" or "must" be brought,[12] the most obvious limiting significance of the phrase "where it might have been brought" is that it refers to places where, under the venue provisions, the action, "may," "shall," or "must" be brought assuming the existence of federal jurisdiction.[13] In the meaning of federal venue provisions as expounded by this Court, and by Congress in § 1406 (b), these, as has been said, are not only places where, under the applicable provision, no objection to the venue is available to the defendant. They are also places where the defendant consents to be sued.

The relevant legislative history of § 1404 (a) is found in the statement in the Reviser's Notes, accompanying the 1948 Judicial Code, that § 1404 (a) "was drafted in accordance with the doctrine of forum non conveniens."[14]

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[11] See cases cited in note 1, *supra*.

[12] See 28 U. S. C. §§ 1391, 1392 (a) and (b), 1393 (a) and (b), 1396–1399, 1400 (b), 1401 and 1403.

[13] See Chief Judge Magruder's opinion for the Court of Appeals for the First Circuit in *In re Josephson*, 218 F. 2d 174, 184.

[14] The whole of the statement in the Reviser's Note dealing with subsection (a) of § 1404 is as follows:

"Subsection (a) was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper. As an example of the need of such a provision, see *Baltimore & Ohio R. Co.* v. *Kepner*, . . . 314 U. S. 44, . . . which was prosecuted under the Federal Employer's

Under that doctrine, the remedy for an inconvenient forum was not to transfer the action, but to dismiss it. In *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 506–507, we held that "[i]n all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them." It is entirely "in accordance" with this view of the doctrine of *forum non conveniens* to hold that transfer may be made at the instance of the defendant, regardless of the plaintiff's right as an original matter to sue him in the transferee court, so long as the defendant stipulates to going forward with the litigation there. Indeed, to hold otherwise as the Court does is to limit § 1404 (a) to a much narrower operation than the nonstatutory doctrine of *forum non conveniens*. Investigation has disclosed several *forum non conveniens* cases, one of them in this Court, where dismissal of the action on the defendant's motion was made upon the condition of the defendant's voluntary submission to the jurisdiction of another more convenient forum when that forum was not available to the plaintiff as of right over the defendant's objection. See *Canada Malting Co.* v. *Paterson Steamship, Ltd.*, 49 F. 2d 802, 804, affirmed, 285 U. S. 413, 424; *Giatilis* v. *The Darnie*, 171 F. Supp. 751, 754; *Bulkley Danton Paper Co.* v. *The Rio Sulado*, 67 F. Supp. 115, 116; *Libby, McNeill & Libby* v. *Bristol City Line of Steamships*, 41 F. Supp. 386, 389; *The City of Agra*, 35 F. Supp. 351; *Straussbarger* v. *Singer Mfg. Co.*, 263 App. Div. 518; *Wendel* v. *Hoffman*, 258 App. Div. 1084. See also *Cerro de Pasco Copper Corp.* v. *Krut Knutsen*, 187 F. 2d 990, and *Swift & Co.* v.

Liability Act in New York, although the accident occurred and the employee resided in Ohio. The new subsection requires the court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so."

Compania Caribe, 339 U. S. 684, 697–698: "it was improper under the circumstances here shown to remit a United States citizen to the courts of a foreign country without assuring the citizen that respondents would appear in those courts and that security would be given equal to what had been obtained by attachment in the District Court. The power of the District Court to give a libellant such assurance is shown by *Canada Malting Co.* v. *Paterson Steamship Ltd.*, 285 U. S. 413, 424 [*supra*]." In view of the familiarity of this device of dismissing for *forum non conveniens* when as of right no other forum was available to plaintiff, upon the defendant's agreement to appear in the more convenient forum, it is almost necessary to suppose, in light of the Reviser's description of § 1404 (a) as "in accordance with the doctrine of forum non conveniens," that transfer under § 1404 (a) may likewise be made where the defendant consents to going forward with the case in the transferee court.

The only consideration of the Court not resting on the "plain meaning" of § 1404 (a) is that it would constitute "gross discrimination" to permit transfer to be made with the defendant's consent and over the plaintiff's objection to a district to which the plaintiff could not similarly obtain transfer over the defendant's objection. To speak of such a situation as regards this statute as "discrimination" is a sterile use of the concept. Mutuality is not an empty or abstract doctrine; it summarizes the reality of fair dealing between litigants. Transfer cannot be made under this statute unless it is found to be in the interest of "convenience" and in the interest of "justice." Whether a party is in any sense being "discriminated" against through a transfer is certainly relevant to whether the interest of justice is being served. If the interest of justice is being served, as it must be for a transfer to be made, how it can be said that there is "discrimination" in

any meaningful sense. Moreover, the transfer provision cannot be viewed in isolation in finding "discrimination." It, after all, operates to temper only to a slight degree the enormous "discrimination" inherent in our system of litigation, whereby the sole choice of forum, from among those where service is possible and venue unobjectionable, is placed with the plaintiff. The plaintiff may choose from among these forums at will; under § 1404 (a) the defendant must satisfy a very substantial burden of demonstrating where "justice" and "convenience" lie, in order to have his objection to a forum of hardship, in the particular situation, respected.

In summary, then, the "plain meaning" of § 1404 (a) does not conclude the present case against the transfer, for the statute, as applied in this case, is not "plain" in meaning one way or another, but contains ambiguities which must be resolved by considerations relevant to the problem with which the statute deals. Moreover, the most obvious significance for the set of words here in question, considered as self-contained words, is that they have regard for the limitations contained in the regular statutory rules of venue. Those rules, it is beyond dispute, take into account the consent of the defendant to proceed in the forum, even if it is not a forum designated by statute. And the doctrine of *forum non conveniens* "in accordance with" which § 1404 (a) was drafted, also took into account the defendant's consent to proceed in another forum to which he was not obligated to submit. Nor can a decision against transfer be rested upon notions of "discrimination" or of unfairness to the plaintiff in wrenching him out of the forum of his choice to go forward in a place to which he objects. In the proper administration of § 1404 (a), such consequences cannot survive the necessity to find transfer to be in the interests of "convenience" and "justice," before it can be made. On the other hand, to restrict transfer as the Court does to

those very few places where the defendant was originally amenable to process and could have had no objection to the venue is drastically to restrict the number of situations in which § 1404 (a) may serve the interests of justice by relieving the parties from a vexatious forum. And it is to restrict the operation of the section capriciously, for such a drastic limitation is not counseled by any legitimate interest of the plaintiff, or by any interest of the federal courts in their jurisdiction. The defendant's interest of course is not involved because he is the movant for transfer.

The essence of this case is to give fair scope to the role of § 1404 (a) in our system of venue regulations, that is, a system whereby litigation may be brought in only a limited number of federal districts, which are chosen generally upon the basis of presumed convenience. Two extremes are possible in the administration of such a system duly mindful of the fact that in our jurisprudence, venue does not touch the power of the court. (1) All venue may be determined solely by rigid rules, which the defendant may invoke and which work for convenience in the generality of cases. In such an extreme situation there would be no means of responding to the special circumstances of particular cases when the rigid venue rules are inappropriate. (2) At the other extreme there may be no rigid venue provisions, but all venue may be determined, upon the defendant's objection to the plaintiff's choice of forum, by a finding of fact in each case of what is the most convenient forum from the point of view of the parties and the court. The element of undesirability in the second extreme is that it involves too much preliminary litigation; it is desirable in that it makes venue responsive to actual convenience. The first extreme is undesirable for according too little, in fact nothing, to actual convenience when the case is a special one; it is desirable in that it does away with preliminary litigation.

If anything is plain, from its history and from its words, it is that § 1404 (a) means to afford a balance, a compromise, between these two extremes. It is in this spirit that its provisions must be read. In the ordinary course the regular venue rules are to prevail, with no preliminary litigation to determine the actual convenience. But the statute means to allow for cases where the ordinary rules are found to work a great hardship; there, actual convenience is to prevail. We should therefore not, as the Court has done, impose limitations upon the operation of § 1404 (a) which have no relation to ordinary considerations governing the place of trial in the federal system and which arbitrarily prevent actual convenience from determining the place of trial. The limitations upon the section should only be those which recognize legitimate countervailing considerations to the free reign of actual convenience, namely limitations regarding the power of the federal courts to adjudicate, and limitation recognizing the historic privilege of the defendant, should he choose to exercise it, to object to the place of trial unless it is affirmatively designated by the venue statute.

It may be urged in answer to this analysis that if transfer is available as a matter of "convenience" and "justice" in every case in which the defendant consents to going forward in the transferee court, § 1404 (a) will entail burdensome preliminary litigation and may, if improperly administered, prove vexatious to plaintiffs. Thus, even arbitrary limitations, such as the Court imposes, may be said to be warranted. In effect this argument against transfer in situations like the present implies distrust in the ability and character of district judges to hold the balance even, that is, to dispose quickly of frivolous contentions and to prevent transfer from proving unduly prejudicial to plaintiffs while according it its proper scope to deal with cases of real inconvenience. "Such apprehension implies a lack of dis-

cipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure. It reflects an attitude against which we were warned by Mr. Justice Holmes, speaking for the whole Court, likewise in regard to a question of procedure: 'Universal distrust creates universal incompetence.' *Graham* v. *United States*, 231 U. S. 474, 480; *Kerotest Mfg. Co.* v. *C-O-Two Co.*, 342 U. S. 180, 185. As in that case, doubts here should be resolved in favor of the competence of the District Courts wisely to administer § 1404 (a). Whatever salutary effect that section is to have must in any event depend upon due appreciation by district judges of the relevant considerations involved in ordering a transfer. Nothing is to be gained by parceling out the areas of their discretion mechanically, making distinctions which have no relevance to the manner in which venue provisions are ordinarily administered in the federal courts. I would therefore permit considerations of "convenience" and "justice" to be operative whenever the defendant consents to going forward in the transferee court on the same terms on which he was sued in the original forum. Against a rare abuse, there will always be available the corrective supervisory power of the Courts of Appeals, and ultimately of this Court.

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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 26

SULLIVAN, CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, PETITIONER,

vs.

OTTO BEHIMER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 31, 1958
CERTIORARI GRANTED OCTOBER 12, 1959

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 26

SULLIVAN, CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, PETITIONER,

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[fol. A]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. .....

OTTO BEHIMER and JOHN A. ROBERTS, Petitioners,

vs.

THE HONORABLE PHILIP L. SULLIVAN, Chief Judge of the United States District Court for the Northern District of Illinois, Respondent.

PETITION FOR A WRIT OF MANDAMUS—Filed June 12, 1958

To the Honorable Judges of the United States Court of Appeals for the Seventh Circuit:

Your petitioners, Otto Behimer and John A. Roberts respectfully state and show to the Court:

1. The petitioners are residents and citizens of the State of Illinois and State of New York, respectively.

2. The respondent is the Chief Judge of the District Court of the United States for the Northern District of Illinois.

3. On the 12th day of February, 1958, the petitioners filed their complaint in the office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, Civil Action, 58 C 238. The U. S. Marshall subsequently served the complaint upon the defendants, Standard Oil Company and Standard Oil Foun-
[fol. B] dation, Inc. On March 10, 1958, the defendants filed their appearances by their attorneys and each defendant filed its "Answer and Motions to Dismiss".

4. On March 11, 1958, the defendants filed a joint motion for transfer of the suit to the United States District Court for the District of Utah, Central Division.

5. Pursuant to order of Court, the defendants, on March 27, 1958 filed the affidavit of Grant A. Brown in support of the motion for transfer together with their brief.

6. On April 24, 1958, the petitioners filed the affidavit of Warren E. King in opposition to the motion for transfer together with their brief.

7. On May 2, 1958, the defendants filed their reply brief in support of the motion for transfer.

8. On May 28, 1958, without having heard oral argument and without a written opinion, the respondent ordered the cause continued to June 6, 1958 for entry of a draft order pursuant to the respondent's oral ruling transferring the cause to the U. S. District Court for the District of Utah, Central Division.

9. Copies of all of the pleadings, affidavits and briefs submitted to the District Court, together with a copy of the order of transfer entered on June, 1958 are hereto attached and form a part of this petition, as Exhibit "A". An Index to Exhibit A immediately follows this petition.

10. The defendants in said action are corporations organized under the laws of the State of Indiana. The amount [fol. C] in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00. The District Court of the United States for the Northern District of Illinois, Eastern Division, has jurisdiction in the action pending in that Court.

11. Section 1404(a) of Title 28, U. S. Code, under which the respondent ordered the transfer of such action, provides that for the convenience of parties and witnesses and in the interests of justice, a judge of a district court may transfer any civil action to any other district "where it might have been brought".

12. Section 1391, 28 U. S. Code, provides that a civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the jurisdictional district where all plaintiffs or all defendants reside.

13. Both of the defendants are Indiana corporations and neither defendant is, or ever was, qualified to do business or resided in the State of Utah, within the jurisdiction of the transferee court, neither defendant maintains or ever maintained offices in the State of Utah; the petitioners could not have brought their suit against the defendants in the District Court of the United States for the District of Utah because such defendants did not reside in Utah or in that district.

14. Your petitioners further show to this Court and urge in support of their Petition for a Writ of Mandamus:

A. The respondent does not have the power, within the meaning of Section 1404(a) of Title 28, U. S. Code to transfer this cause to the District Court for the District of Utah for the reason that the transferee district was not a district "where it might have been [fol. D] brought".

B. If the respondent does have such power and the matter lies within his discretion, the respondent abused his discretion by allowing the motion to transfer prematurely, that is to say, before the motions to dismiss of the defendants had been determined.

C. The affidavit submitted by defendants does not disclose facts which would warrant the transfer or which sustain the burden of proof necessary to overcome plaintiffs' choice of forum. The granting of the motion to transfer constituted an abuse of discretion on the part of the respondent.

15. This Court in its very recent decision in *General Casualty Co.* v. *Grubb*, 253 F. 2d 51 has accepted the view that Section 1404(a) includes consent venue as well as statutory venue. Petition for Certiorari in the United States Supreme Court by the petitioner in that cause is now pending, No. 1024.

16. The order entered by the respondent transferring the action to the District Court of the United States for the District of Utah, Central Division is not an appealable order under Section 1291 of Title 28, U. S. Code. The peti-

tioners have no remedy except by a writ of mandamus to compel the respondent to retain jurisdiction in the action and to award whatever relief the court may determine the petitioners to be entitled to.

17. The question as to whether the words "where it might have been brought" in Section 1404(a) contemplates only [fol. E] venue permitted under Section 1391, or whether those words include consent venue has never been decided by the United States Supreme Court. Conflicting views are expressed in the opinions of the various districts and circuits, and in dissenting opinions. Petitioners suggest that notwithstanding Rule 19 (c) of this Court, if the issuance of the writ of mandamus depends on the view of this court as expressed in *General American Casualty Co.* v. *Grubb*, supra, that this court withhold its decision herein until final determination of the Petition for Writ of Certiorari by the United States Supreme Court. Petitioners urge, however, that the writ of mandamus should be granted for the reasons set forth in Paragraphs 14 B and 14 C, above.

18. This court has jurisdiction to issue a writ of mandamus under the decisions in *Chicago R. I. & P. R. Co.* v. *Igoe*, 220 F. 2d 299 (C.A. 7, 1955), *LaBuy* v. *Howes Leather Co.*, 352 U. S. 249, 1 L. Ed. (2d) 290, and *General Casualty Co.* v. *Grubb*, 253 F. 2d 51 (C.A. 7, 1958).

Wherefore, your petitioners, Otto Behimer and John A. Roberts pray for a writ of mandamus to issue out of this Honorable Court directed to the Honorable Philip L. Sullivan, Chief Judge of the District Court of the United States for the Northern District of Illinois, to compel the district judge to vacate an order transferring the action to the United States District Court for the Northern District of Utah and to retain jurisdiction of such action for the purpose of adjudicating the issues raised by the Complaint of your petitioner.

Otto Behimer and John A. Roberts, By Warren E. King, Their attorney.

Attorney for Petitioners, Warren E. King, 228 N. La Salle St., Chicago, Illinois.

[fol. F] *Duly sworn to by Otto Behimer, jurat omitted in printing.*

Exhibit "A" to Petition

[fol. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

General No. 58C 238

OTTO BEHIMER and JOHN A. ROBERTS,

Plaintiffs,

vs.

STANDARD OIL COMPANY, an Indiana corporation and STANDARD OIL FOUNDATION, INC., an Indiana corporation,

Defendants.

COMPLAINT—Filed February 12, 1958

The Plaintiffs, Otto Behimer and John A. Roberts, by Warren E. King and Jerome M. Brooks, their attorneys, allege:

1. The Plaintiffs at all times herein mentioned were and now are residents and citizens of the State of Illinois and State of New York, respectively, and were at all times herein referred to, and are the registered and actual owners of 900 shares and 1,000 shares respectively, of the common stock of Utah Oil Refining Co., a corporation organized under the laws of the State of Utah.

2. The Defendants, Standard Oil Co., and Standard Oil Foundation, Inc. are corporations organized and existing under the laws of the State of Indiana.

3. This action is based upon diversity of citizenship and the matter in controversy, exclusive of interests and costs, exceeds the sum or value of $3,000.00.

4. On June 11, 1956, there were issued and outstanding 1,391,116 shares of common stock of Utah Oil Refining Co. [fol. 2] hereinafter called UTOCO) of which 1,008,640 were

owned by Standard Oil Co. and 71,380 were owned by Standard Oil Foundation, Inc.

5. 140,519 shares of the common stock of UTOCO were owned by the following stockholders, (hereinafter referred to as the Controlled Stockholders), some of whom were the officers and directors of UTOCO.

Bennett Association	30,000
David W. Bennett	100
Frances G. Bennett	400
H. H. Bennett	2,000
Richard S. Bennett	3,500
Robert F. Bennett	100
Rosetta W. Bennett	200
Wallace F. Bennett	2,000
Wallace G. Bennett	15
J. D. Campbell	1,000
May H. Doscher	475
John L. Firmage	250
Rosemary B. Fletcher	100
Lois M. Greenwood	897
M. J. Greenwood	1,421
M[illegible]. Wattie Harris	917
W[illegible]iam H. Harris	10,000
Phyllis G. Harvey	930
Ruth Harris Hite	777
Edward S. Holt	4,540
Reed E. Holt	500
Francis B. Jeppson	100
Elise F. Musser	1,407
[fol. 3]	
Samuel C. Powell	750
Mabel W. Reynolds	100
Stephen L. Richards	584
Katherine E. Sage	4,450
Hilda Sandmann	400
Aurelia H. Schettler, Trustee under Declaration of Trust dated June 24, 1955, with Catherine A. Lowe Hampton	135
Dan B. Shields	1,200
George Smith	400

Mary B. Smith	1,500
Genevieve Stafford	1,692
Harold B. Stafford	1,992
Tracy-Collins Trust Company	4,331
Tracy-Collins Trust Co., Guardian of the Estate of Sabina Degnan	150
Tracy-Collins Trust Co., Guardian of the Estate of A. J. Duquesne	667
Walker Bank & Trust Co., Trustee under the Will of James J. Burke, Deceased	250
Walker Bank & Trust Co., Trustee under deed of Trust dated November 1, 1948 with Charles B. Petty and Maggie C. Petty	100
Walker Bank & Trust Co., Executor of the Estate of Margaret Burke Raleigh, Deceased	549
Walker Bank & Trust Co., Executor of the Estate of Emma B. Selbach, Deceased	800
Walker Bank & Trust Co., Trustee under will of Ernest A. Tripp, Deceased	425
A. C. Wallace	3,856
Glen Wallace	300
Henry A. Wallace, Jr.	200
Ina Claire Wallace	480
[fol. 4]	
John M. Wallace	45,814
John M. Wallace, Jr.	20
M. Elen Wallace	50
William R. Wallace	2,874
William R. Wallace, Jr.	3,161
Elizabeth B. Winters	1,325
TOTAL	140,519

There remained 170,577 shares of UTOCO owned by others, including the Plaintiffs herein, referred to herein as the Minority Stockholders.

6. At all times herein referred to the officers and directors of UTOCO were under the control and domination of Standard Oil Company and Standard Oil Foundation, Inc. and it became and was the duty of the said Defendants and

the Controlled Stockholders not to use their majority control of UTOCO in violation or derogation of the rights of the Plaintiffs or other minority stockholders not mentioned herein. The Plaintiffs bring this action in a representative capacity on behalf of themselves and the other minority stockholders of UTOCO who are or were similarly situated to Plaintiffs, as a representative suit. All of the acts and doings of UTOCO and the Defendants, herein complained of, were the direct result of the dominance and control of the Defendants over UTOCO and its officers and directors.

7. Prior to June 11, 1956, the Defendants caused a Delaware corporation to be formed under the name of Ten West Broadway Oil Corporation, (hereinafter called TENOCO), [fol. 5] which corporation was wholly owned and controlled by Standard Oil Co. and Standard Oil Foundation, Inc. On June 11, 1956, an Agreement was entered into by and between UTOCO and TENOCO wherein TENOCO agreed to buy all of the assets and assume all the liabilities of UTOCO in exchange for 695,558 shares of Standard Oil Co. theretofore acquired by TENOCO from Standard Oil Co.; UTOCO was then to distribute its assets to its stockholders, said assets consisting solely of the 695,558 shares of Standard Oil Co. for each 2 shares of UTOCO theretofore owned by the stockholders of UTOCO and UTOCO was then to be dissolved. A copy of the Agreement dated June 11, 1956 between UTOCO and TENOCO is hereto attached, marked "Plaintiffs' Exhibit 1" and made a part hereof.

8. Afterwards UTOCO changed its name to Labra Oil Company and distributed its sole asset, the shares of Standard Oil Company which it received pursuant to the Agreement of June 11, 1956, and caused itself to be dissolved.

9. The Agreement of June 11, 1956 was part of a plan of the Defendants herein, together with the Controlled Stockholders, in violation of and contrary to their fiduciary duties and obligations as majority stockholders to the Plaintiffs and other Minority Stockholders who were or are similarly situated to the Plaintiffs:

(a) To Permit the Defendants herein to acquire 100% control of the assets of UTOCO at a price below the fair market value thereof.

(b) To compel Plaintiffs and other Minority Stockholders involuntarily to become shareholders of Standard Oil Company.

[fol. 6] (c) To deprive Plaintiffs and other Minority Stockholders of their proportionate share in the valuable growing business of UTOCO.

10. In furtherance of the plan of the Defendants to acquire 100% of the assets of UTOCO and compel Plaintiffs and other Minority Stockholders involuntarily to become shareholders of Standard Oil Co. and deprive them of their proportionate share of the true value of UTOCO, the Defendants and the Controlled Stockholders through their control and domination of the officers and directors of UTOCO did one or more of the following acts:

(a) The common stock of UTOCO is not listed on any Exchange, but is traded on the over-the-counter market and the Defendants and the Controlled Stockholders acted in concert to depress the price of UTOCO in the over-the-counter market.

(b) In order to depress the over-the-counter price of UTOCO and temporarily depress the earnings of UTOCO, UTOCO acquired and retained large cash reserves, government bonds and securities equal to 21.3% of the total assets of UTOCO; other than interest received on the securities, these assets produced no revenue for UTOCO.

(c) The directors and officers failed to take advantage of the oil reserves of UTOCO, or to expand the business utilizing the excess cash and securities so that on Dec. 31, 1955 the reserves for depreciation, amortization and depletion of UTOCO's fixed assets were approximately 44% of the cost of such assets.

(d) UTOCO failed to declare as dividends a reasonable [fol. 7] portion of the annual earnings in order further to depress the over-the-counter price of UTOCO stock.

11. The actual value of UTOCO stock on June 12, 1956 based on the value of the underlying assets, earning power of said assets and goodwill, was in excess of $60.00 per share. No appraisal or independent valuation was made by UTOCO or by the Defendants of the value of the underlying assets of UTOCO or of the value of the shares UTOCO based on the value of the underlying assets or the earning power of said assets or goodwill of UTOCO. UTOCO owned approximately 700 retail gasoline stations, storage facilities, trucks and equipment throughout the Northwest section of the United States and no consideration was given to the true value, earning power or goodwill (other than book value) in determining the exchange ration of UTOCO and Standard Oil stock. The market price of Standard Oil Company stock on June 12, 1956 was $59.83; the market value of one-half share of said stock was $29.92. The Plaintiffs and other Minority Stockholders who were or are similarly situated to Plaintiffs suffered damages to the extent of $30.08 per share for the 170,577 shares owned by Plaintiffs and other Minority Stockholders of UTOCO amounting to $5,130,956.16.

12. Plaintiffs believe other compensation, the exact nature of which is unknown to the Plaintiffs, was given or extended to the Controlled Stockholders to secure their co-operation and acquiescence in the plan to deprive Plaintiffs and other Minority Stockholders to their rights in the premises.

13. No demand has been made upon the officers or directors of UTOCO for the relief prayed for herein or for them [fol. 8] to bring this suit on behalf of UTOCO or its shareholders; such demand would be futile, as the officers and directors are antagonistic to the interests of these Plaintiffs and the officers and directors are under the control and domination of the Defendants.

WHEREFORE, the Plaintiffs pray the Court:

(a) To require the Defendants fully to answer the Interrogatories hereto attached.

(b) To require the Defendants to account for the damages suffered by the Plaintiffs and other Minority Stockholders who were or are similarly situated to Plaintiffs.

(c) To enter Judgement against the Defendants, in favor of Plaintiffs and other Minority Stockholders who are or were similarly situated to Plaintiffs for the losses sustained by each shareholder being deprived of the fair and reasonable value of their respective holdings of UTOCO stock.

(d) For such other relief as the Court may find just and equitable, including allowance to the Plaintiffs of their costs, disbursements, and counsel fees,

Otto Behimer and John A. Roberts

By: .....

one of their attorneys

Attorneys for Plaintiffs:

Warren E. King
Jerome M. Brooks
228 N. LaSalle Street
Chicago 1, Illinois
Fin 6-4222

[fol. 9]

State of Illinois)
County of Cook) SS.

AFFIDAVIT OF OTTO BEHIMER

Otto Behimer being first duly sworn upon his oath deposes and says:

1. He is one of the Plaintiffs in the above Complaint.
2. He is now a shareholder and was a shareholder at the time of the transactions complained of in said Complaint.

3. This action is not a collusive one to confer on this Court jurisdiction of any action of which it would not otherwise have jurisdiction.

.....

Subscribed and sworn
to before me this
..... day of January, 1958

.....
Notary Public

[fol. 10]
State of New York)
County of .....) SS.

AFFIDAVIT OF JOHN A. ROBERTS

John A. Roberts being first duly sworn upon his oath deposes and says:

1. He is one of the Plaintiffs in the above Complaint.
2. He is now a share holder and was a shareholder at the time of the transactions complained of in said Complaint.
3. This action is not a collusive one to confer on this Court jurisdiction of any action of which it would not otherwise have jurisdiction.

.....

Subscribed and sworn
to before me this
..... day of January, 1958

.....
Notary Public

[fol. 11]

INTERROGATORIES

1. What were the dates of acquisition and price per share paid for UTOCO stock acquired by each Defendant? From whom were such shares obtained?

2. How much crude oil, natural gas liquids, and natural gas was obtained by Standard Oil Co. and affiliates from UTOCO and vice versa in the period from Jan. 1, 1950 to Dec. 31, 1955? State dates of delivery, price per unit, and method of determining prices of each product from time to time to time.

3. Were or are any of the controlled stockholders listed in Paragraph 5 of the Complaint now employed by the Defendants or either of them or by TEXOCO or its successor by change of name as officer, director or otherwise? If so, give date of employment, capacity, and salary including bonus and pension arrangements, if any.

4. Was there an appraisal of the property owned by UTOCO between July 1, 1955 and June 6, 1956? If so, by whom and when was such appraisal made? Provide copy of such appraisal. If no appraisal was made, subsequent to July 1, 1955, when was the last appraisal made and by whom? Provide copy of such appraisal.

5. When and by whom was the estimate made, as of Dec. 31, 1955 of the reserves of the crude oil and the natural gas liquid of UTOCO? Provide copy of surveys and findings upon which such estimate was made.

[fol. 12] 6. List and describe all properties and assets owned by UTOCO and its subsidiaries on June 12, 1956, including, but not limited to, retail service stations, trucks, storage facilities, and oil and gas leases. State terms of such leases, dates and costs of purchase of such properties and assets, cost of improvements, betterments, drillings, and betterments, and depreciation and depletion taken on each property.

7. Were any of the properties or assets mentioned in Paragraph 6 disposed of after June 12, 1956? If so, state date of disposition, to whom disposed of, price and terms of such disposition.

8. What exploration and drilling expenditures were made by UTOCO between Jan. 1, 1950 and Dec. 31, 1955? State the nature and results of such exploration and drilling expenditures.

9. Were any meetings, conferences, or correspondence had between the Standard Oil Co. and UTOCO their intermediaries and brokers between Jan. 1, 1950 and Dec. 31, 1955 concerning any of the following matters:

(a) The dividend policy of UTOCO, the declaration of dividends and amounts thereof.

(b) The expenditures to be made by UTOCO for exploration, drilling or acquisition of new oil or gas fields.

(c) The determination of the ratio of 1 share of UTOCO for ½ share of Standard common stock as the alleged fair exchange value.

If so, provide minutes of such meetings or conferences and copies of correspondence.

[fol. 13] 10. Was any additional consideration given to the controlled stockholders listed in Paragraph 5 of the Complaint other than the same exchange ratio for their respective holdings of common stock of UTOCO by way of additional compensation, bonus, employment agreements or arrangements, or otherwise? If so, state the nature of such compensation paid to or arranged with each of the controlled stockholders.

11. State what compensation, if any, was paid to the intermediaries and/or brokers for arranging the purchase by Standard Oil Co. of Indiana for acquisition of the assets of UTOCO, and to whom and when such compensation was paid.

[fol. 14]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action No. 58 C 238.

OTTO BEHIMER and JOHN A. ROBERTS,

Plaintiffs,

vs.

STANDARD OIL COMPANY, an Indiana corporation and STANDARD OIL FOUNDATION, INC., an Indiana charitable corporation,

Defendants.

ANSWER AND MOTIONS TO DISMISS OF STANDARD OIL COMPANY—filed March 10, 1958

Now comes STANDARD OIL COMPANY, an Indiana corporation, by Weymouth Kirkland, Howard Ellis, John C. Butler, and Louis J. Keating, its attorneys, and for answer to the Complaint of Otto Behimer and John A. Roberts, says:

1. Answering paragraph 1 of the Complaint:

A. Defendant admits that Otto Behimer became the holder of record of the following shares of the common stock of Utah Oil Refining Company, a corporation organized under the laws of the State of Utah (hereinafter called Utoco), and that such shares were acquired by Otto Behimer, according to Utoco's stock register, on the following dates:

Date of Acquisition	*Number of Shares*
6-9-54	350
6-18-54	200
7-2-54	50
7-9-54	100
7-20-54	100
11-26-54	100;

[fol. 15] and that the address of Otto Behimer, as shown on Utoco's stock register, was care of M. M. Birnbaum, 39 South La Salle St., Room 520, Chicago, Illinois.

B. Defendant admits that John A. Roberts became the holder of record of the following shares of the common stock of Utoco, and that such shares were acquired by John A. Roberts, according to Utoco's stock register, on the following dates:

Date of Acquisition	*Number of Shares*
5-24-56	150
5-24-56	50
5-24-56	200
5-24-56	200
5-24-56	100
5-24-56	200
5-24-56	100;

and that the address of John A. Roberts, as shown on Utoco's stock register, was 17 East 70th St., New York, N. Y.

C. Defendant denies that Otto Behimer and John A. Roberts are presently stockholders of Utoco for the reason that, pursuant to the provisions of Title 78, Chapter 42 of the Utah Code Annotated, Utoco (which by change of name became known as Lubra Oil Company) was dissolved by decree dated September 25, 1956 entered by the District Court of the State of Utah, Third Judicial District, County of Salt Lake. A copy of such decree of dissolution is attached hereto, marked Exhibit A, and made a part hereof. Such dissolution proceedings, as the decree [fol. 16] recites, were approved by Utoco stockholders owning, in the aggregate, 96.1% of the issued and outstanding stock of the corporation, at a duly called stockholders' meeting held at the offices of the corporation in Salt Lake City, Utah, on July 11, 1956.

D. Except as herein admitted or denied, defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph i of the Complaint, and therefore denies the same.

2. Answering paragraph 2 of the Complaint, defendant admits that it is a corporation organized and existing under the laws of the State of Indiana and that Standard Oil Foundation, Inc., is a charitable corporation organized and existing under the laws of the State of Indiana pursuant to the provisions The Indiana General Not for Profit Corporation Act, Title 25, Chapter 3, Burns Indiana Statutes Annotated.

3. Answering paragraph 3 of the Complaint, defendant admits that there is diversity of citizenship between plaintiffs and defendants and that the amount in controversy between Otto Behimer and defendants, and between John A. Roberts and defendants, is claimed by each to exceed the sum or value of $3000.00.

4. Answering paragraph 4 of the Complaint, defendant admits the allegations thereof and states that there was no other stock of Utoco, other than the 1,391,116 shares of its common stock, which was authorized, issued or outstanding.

[fol. 17] 5. Answering paragraph 5 of the Complaint, defendant admits that 140,519 shares of the common stock of Utoco were held by the stockholders named, and in the amounts listed, in said paragraph 5. Defendant further admits (1) that four of such stockholders, of the fifty-two named, were, on July 11, 1956, directors of Utoco, being Wallace F. Bennett, William H. Harris, Edward S. Holt, and Stephen L. Richards, and (2) that there remained 170,577 shares of Utoco which were held, according to Utoco's stock register, by 920 stockholders, including plaintiffs, as of July 11, 1956. Defendant takes issue with the correctness and propriety of plaintiffs' appellation of the said fifty-two stockholders as "Controlled Stockholders", and defendant specifically denies that such stockholders were in any degree controlled other than by the dictates of their own individual business judgments. Defendant further denies that any of the said fifty-two stockholders were officers of Utoco on July 11, 1956.

6. Answering paragraph 6 of the Complaint, defendant denies the allegations thereof.

7. Answering paragraph 7 of the Complaint, defendant admits that the copy of the agreement, attached to the Complaint and marked Plaintiff's Exhibit 1, is a true and correct copy of the agreement entered into, as of June 11, 1956, between Utoco and Ten West Broadway Oil Corporation, a Delaware corporation (hereinafter called Tenoco). Except as thus admitted, defendant denies the allegations of paragraph 7 of the Complaint, and states the facts to be:

[fol. 18] A. On June 12, 1956, notice was given to the Utoco stockholders of a special stockholders' meeting to be held on July 11, 1956 in Salt Lake City, Utah, to consider and vote for or against:

(1) The approval of the agreement of June 11, 1956 between Utoco and Tenoco, and the confirmation and approval of the transfer and sale of the assets of Utoco to Tenoco pursuant to the agreement;

(2) The change of name of Utoco to Lubra Oil Company or some other name dissimilar to "Utah Oil Refining Company"; and

(3) The liquidation and distribution of the assets of Utoco and the winding up and dissolution of Utoco.

A copy of the notice of the said special meeting, together with a proxy statement, was sent to all stockholders of record of Utoco at the close of business on June 12, 1956. Such notice and proxy statement are attached hereto, marked Exhibit B, and made a part hereof.

B. Although not required by the General Rules and Regulations of the Securities and Exchange Commission (since Utoco was not a company whose stock was listed on a national exchange), the proxy statement was prepared with respect to information required in a proxy statement used by a listed company.

C. Attached as Appendix I to the said proxy statement is a copy of the agreement of June 11, 1956 between Utoco [fol. 19] and Tenoco (Plaintiff's Exhibit 1), which set forth the terms of the proposed transfer and sale of Utoco's

assets to Tenoco. The terms of the said agreement and of the transfer and sale, which were among the subjects noticed for consideration by, and approval or disapproval of, the Utoco stockholders at the special meeting called for July 11, 1956, are summarized on pages 2 and 3 of the proxy statement.

D. As one of the conditions to the fulfillment of the agreement, and to the transfer and sale of the assets of Utoco to Tenoco, it was provided in the agreement (paragraph 6 thereof) that the said transfer and sale must be approved at the aforesaid stockholders meeting by the affirmative vote of defendant and of the holders of more than 50% of the outstanding stock of Utoco other than that held by defendant and Standard Oil Foundation, Inc.

E. At the special meeting of the stockholders of Utoco, held on July 11, 1956 pursuant to the aforesaid notice, there were present, by person or by proxy, the holders of 1,352,608 shares of Utoco stock, out of a total outstanding 1,391,116 shares of such stock. The results of the stockholders' votes on the subjects noticed for the meeting were as follows:

[fol. 20]

Subject	Number of Shares For	Against
The approval of the agreement of June 11, 1956 between Utoco and Tenoco, and the confirmation and approval of the transfer and sale of the assets of Utoco to Tenoco	1,336,880	15,728
The change of name to Lubra Oil Company	1,336,880	15,728
The liquidation and distribution of the assets of Utoco and the winding up and dissolution of Utoco	1,336,880	15,728

Each of the three subjects was therefore approved by the affirmative vote of the holders of more than 96.1% of the

outstanding stock of Utoco. The Utoco stockholders voting negatively on such subjects accounted for approximately 1.1%, and such stockholders who did not vote accounted for approximately 2.8%, of such outstanding stock.

F. Excluding the Utoco stock held by defendant and Standard Oil Foundation, Inc., which was voted affirmatively on the above subjects, the Utoco stockholders' action thereon were:

[fol. 21]

Subject	Number of Shares For	Against	Not Present
The approval of the agreement of June 11, 1956 between Utoco and Tenoco, and the confirmation and approval of the transfer and sale of the assets of Utoco to Tenoco	256,860	15,728	38,508
The change of name to Lubra Oil Company	256,860	15,728	38,508
The liquidation and distribution of the assets of Utoco and the winding up and dissolution of Utoco	256,860	15,728	38,508

Each of the three subjects was therefore approved by the affirmative vote of approximately 82.57% of the outstanding stock of Utoco other than that held by defendant and Standard Oil Foundation, Inc. The Utoco stockholders voting negatively on such subjects accounted for approximately 5.05%, and such stockholders who did not vote accounted for approximately 12.38%, of such outstanding stock other than that held by defendant and Standard Oil Foundation, Inc.

G. In Pursuance of the aforesaid stockholder authorization the agreement between Utoco and Tenoco of June

11, 1956 was completed and Utoco transferred and sold its assets to Tenoco and received from Tenoco in Consideration therefor 695,558 shares of the capital stock of defendant. Thereafter, by charter amendment, Tenoco changed its name to Utah Oil Refining Company and Utoco [fol. 22] changed its name to Lubra Oil Company. On July 17, 1956 and again on July 25, 1956, the stockholders of Lubra Oil Company (Utoco) were notified by letter of its president of the action taken at the special meeting of July 11, 1956, and instructed as to the manner of exchanging their shares for shares of defendant's capital stock. Copies of these two letters are attached hereto, marked Collective Exhibit C, and made a part hereof. On August 9, 1956, Lubra Oil Company (Utoco) made application for dissolution to the District Court of the State of Utah, Third Judicial District, County of Salt Lake, which application was on that day ordered filed, and hearing thereon set for September 25, 1956. The former stockholders of Utoco were notified of this application for dissolution, both by published notice and by personal mail, and such proceedings were held thereafter on such application that on September 25, 1956, a decree of dissolution (Exhibit A hereto) was entered by said Court, without intervention or protest on the part of any stockholders.

H. As of a date shortly prior to the filing of this Answer, the holders of all but 9,674 shares of the former Utoco stock (or approximately 99.31%) had surrendered such stock and received defendant's stock in exchange therefor on the approved basis of two shares of the former for one of the latter. The tabulation of such exchange (excluding the two defendants therefrom) is as follows: [fol. 23]

(1) Stockholders Who Voted Affirmatively

a. Exchange effected	256,538
b. Exchange not yet effected (5 holders)	322
Total	256,860

(2) Stockholders Who Voted Negatively	
a. Exchange effected	7,354
b. Exchange not yet effected (17 holders)	8,374
Total	15,728
(3) Stockholders Not Present	
a. Exchange effected	37,530
b. Exchange not yet effected (5 holders)	978
Total	38,508

8. Answering paragraph 8 of the Complaint, defendant admits the allegations thereof.

9. Answering paragraph 9 of the Complaint, defendant denies the allegations thereof.

10. Answering paragraph 10 of the Complaint, defendant admits that the common stock of Utoco was not listed on any exchange, but was traded on the over-the-counter market. Except as thus admitted, defendant denies the allegations of paragraph 10.

11. Answering paragraph 11 of the Complaint, defendant denies the allegations of the first, third and fifth sentences thereof. As to the allegations of the second sen- [fol. 24] tence thereof, defendant states that the factors as to the value of the underlying assets of Utoco, or of the value of the shares of Utoco based on the value of the underlying assets or the earning power of said assets or good will of Utoco, which were taken into account were those stated in the proxy statements attached to the notice of the special meeting of July 11, 1956, Exhibit B hereto. Defendant further states that the market price of its stock on July 11, 1956 was $61.00 per share.

12. Answering paragraph 12 of the Complaint, defendant denies the allegations thereof.

13. Answering paragraph 13 of the Complaint, defendant admits that no demand has been made upon the offi-

cers or directors of Utoco for the relief prayed for in the Complaint, or for them to bring this suit on behalf of Utoco or its shareholders. Except as thus admitted, defendant denies the allegations of paragraph 13, and further states the fact to be that plaintiffs did not appear at the stockholders meeting of July 11, 1956 to voice their views (except by negative proxy) or to secure from the Utoco shareholders such action as plaintiffs might have desired.

MOTIONS TO DISMISS

14. Defendant moves to dismiss this suit, insofar as it may purport to be a derivative or secondary action by shareholders pursuant to Rule 23 (b) of the Federal Rules of Civil Procedure, for the following reasons:

[fol. 25] A. The failure to join Utoco (by change of name Lubra Oil Company) as a party to this suit, such corporation being an indispensable party.

B. The failure of plaintiffs to verify their complaint under oath, as required by Rule 23 (b) of the Federal Rules of Civil Procedure.

C. The failure of plaintiffs to set forth with particularity their efforts to secure from the Utoco shareholders such action as they desire, as required by Rule 23 (b) of the Federal Rules of Civil Procedure.

D. The absence of Tenoco (by change of name Utah Oil Refining Company, a Delaware corporation) as a party to this suit, such corporation being the purchaser and transferee of the assets of Utoco.

E. The failure of plaintiffs to allege a derivative or secondary cause of action.

15. Defendant moves to dismiss this suit, insofar as it may purport to be an action pursuant to Rule 23 (a) (1) of the Federal Rules of Civil Procedure, for the following reasons:

A. The Complaint fails to allege facts showing that the plaintiffs are proper representatives of, or will adequately represent, the class on whose behalf they purport to sue and, on the contrary, they are not such representatives of the class described in the Complaint [fol. 26] so as to entitle them to maintain this action.

B. The class which plaintiffs purport to represent does not in fact exist.

C. The class which plaintiffs purport to represent, if such can be said to exist, has affirmatively authorized and approved that of which plaintiffs complain.

D. The absence of Tenoco (by change of name Utah Oil Refining Company, a Delaware corporation) as a party to this suit, such corporation being the purchaser and transferee of the assets of Utoco.

E. The character of the right which plaintiffs seek to enforce is not joint, common or secondary.

16. Defendant moves to dismiss this suit, insofar as it may purport to be an action pursuant to Rule 23 (a) (3) of the Federal Rules of Civil Procedure, for the following reasons:

A. The persons similarly situated to plaintiffs are not so numerous as to make it impracticable to bring them all before the Court.

B. There is no common question of law or fact affecting the several rights of plaintiffs and of persons alleged to be similarly situated to plaintiffs.

[fol. 27] C. The absence of Tenoco (by change of name Utah Oil Refining Company, a Delaware corporation) as a party to this suit, such corporation being the purchaser and transferee of the assets of Utoco.

WHEREFORE, Standard Oil Company prays judgment dismissing the Complaint.

Weymouth Kirkland

Howard Ellis

John C. Butler

Louis J. Keating

Kirkland, Fleming, Green, Martin & Ellis
130 East Randolph Drive
RAndolph 6-2929

Attorneys for defendant, Standard Oil Company

Thomas E. Sunderland
Richard J. Farrell
Of Counsel.

[fol. 28]

EXHIBIT "A" TO ANSWER

IN THE DISTRICT COURT OF THE STATE OF UTAH
Third Judicial District
IN AND FOR THE COUNTY OF SALT LAKE

In the Matter of the Voluntary Dissolution of

LUBRA OIL COMPANY, a corporation.

DECREE OF DISSOLUTION

The application of Lubra Oil Company, a corporation of the State of Utah, having come on regularly to be heard before the above entitled court on September 25, 1956, at 2:30 o'clock PM. pursuant to notice duly given according to law, and the court having received sworn testimony and docu-

mentary proof in explanation and in support of said Application for Dissolution, and the object, the court finds:

1. On July 16, 1956, the Articles of Incorporation of Utah Oil Refining Company, a Utah corporation, were amended so as to change its name to Lubra Oil Company;

2. Lubra Oil Company is a corporation of the State of Utah;

3. At a meeting of the stockholders of Utah Oil Refining Company, A Utah corporation, now called Lubra Oil Company, duly called and held at the offices of the corporation in Salt Lake City, Utah, on July 11, 1956 at 10:00 A. M., the dissolution of the corporation was resolved upon by the vote of the stockholders of the corporation owning, in the aggregate, 96.1% of the issued and outstanding stock of the corporation entitled to vote at said meeting;

4. Subsequent to said stockholders' meeting in paragraph 3 next above mentioned, the directors of said corporation at a meeting duly called and held at the offices of the corporation in Salt Lake City, Utah, on July 11, 1956 at 2:00 P. M., resolved that the corporation make application to the Third Judicial District Court of the State of Utah, and for the County of Salt Lake, for the dissolution and winding up of the corporation;

5. All claims of the State of Utah for fees, taxes, penalties, interests and costs against the corporation have been satisfied and discharged;

6. All claims and demands against the corporation have been satisfied and discharged and its debts and taxes are all paid or otherwise adequately provided for;

[fol. 29] 7. It is to the best interest of said corporation and those interested therein that the corporation be dissolved;

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

1. That Lubra Oil Company, a corporation organized and existing under and by virtue of the laws of the State of Utah, is dissolved;

2. That Lubra Oil Company shall continue in existence for the purpose of winding up its affairs notwithstanding this Decree of Dissolution; and Lubra Oil Company and its officers shall settle and wind up its affairs and shall distribute, or cause to be distributed, by appropriate means its remaining assets, if any there be, to those entitled thereto;

3. That the stockholders of the corporation, upon receiving their respective shares of the property of the corporation, surrender, or cause to be surrendered, to the secretary of the corporation, their stock certificates for cancellation.

Dated this 25th day of September, 1956.

BY THE COURT:

/s/ STEWART M. HANSON
JUDGE

Attest: Alvin Keddington, Clerk

By John W. Avery, Deputy Clerk

(SEAL) Endorsed No. 109512 Filed SEP 25 1956

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, Alvin Keddington, Clerk in and for the County of Salt Lake and Ex-Officio Clerk of the District Court of the Third Judicial District in and for Salt Lake County, State of Utah, do hereby certify that the foregoing is a full, true and correct copy of the original DECREE OF DISSOLUTION

In the Matter of the Voluntary Dissolution

of

LUBRA OIL COMPANY, a corporation

No. 109,512

as appears of record in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, this 25th day of September A.D., 1956.

ALVIN KEDDINGTON Clerk

By /s/ Jacob Werly Deputy Clerk

(SEAL)

[fol. 30]

TO THE STOCKHOLDERS OF
UTAH OIL REFINING COMPANY

Which by Amendment to its Articles of Incorporation Is now Named Lubra Oil Company:

July 25, 1956

As reported to you in my letter dated July 17, 1956, the stockholders of your company, at the special meeting held on July 11, 1956, approved the transfer and sale of all the company's assets and property to Ten West Broadway Oil Corporation, a Delaware corporation, by a very substantial affirmative vote. Accordingly, on July 13, 1956, the assets and property were transferred to the Delaware corporation and your company has received in exchange therefor 695,558 shares of the Capital Stock of Standard Oil Company, an Indiana corporation. This stock now constitutes your company's sole asset and is to be distributed to the stockholders as authorized at the special stockholders' meeting.

You must surrender your Utah Oil Refining Company stock certificate(s) in order to receive distribution of the stock of Standard Oil Company to which you are entitled. As you know, this distribution will be at the rate of one share of Standard stock for each two shares of the stock of your company.

Your Utah Oil Refining Company stock certificate(s) must be sent to:

First Security Bank of Utah, N.A.
Attention: Trust Department
Main at Fourth South Street
Salt Lake City 9, Utah

There is enclosed a Letter of Transmittal which you should complete and send to the above bank along with your stock certificate(s). An envelope addressed to the bank is enclosed for your convenience. In filling out the Letter of Transmital please read carefully and observe the instructions printed on the back of the letter.

If you own an uneven number of shares of the Common Stock of Utah Oil Refining Company you will receive an interest in one-half a bearer scrip certificate. The terms of such scrip will be explained at the time of its distribution.

Distribution of the Standard Oil Company stock certificates will begin on August 8, 1956. You will receive certificates for Standard stock only upon surrender of your Utah Oil Refining Company stock certificate (s). I urge you to transmit your Utah Oil Refining Company stock cer- [fol. 31] tificate (s) for exchange as soon as possible so that you may promptly receive future dividends to which you may be entitled as a stockholder of Standard Oil Company.

As you were advised in the Proxy Statement, the Commissioner of Internal Revenue has ruled that under existing Federal Income Tax Laws no gain or loss will be recognized to stockholders of your company upon the exchange of their stock for stock of Standard Oil Company, and, further, that the basis of the Standard stock in your hands will be the same as the basis of the stock of your company exchanged therefor.

As stated in the instructions on the back of the Letter of Transmittal, the method of delivery of your Utah Oil Refining Company stock certificate(s) to the First Security Bank of Utah, N.A. is at your option and risk, but registered mail is suggested.

May I express to you appreciation of your support and your many helpful comments.

A. J. BADGER
President, Utah Oil Refining Company, Which by Amendment to its Articles of Incorporation is now named Lubra Oil Company.

(See Opposite) ☞

[fol. 32]

EXHIBIT "B" TO ANSWER
UTAH OIL REFINING COMPANY

Notice of Special Meeting of Stockholders

To Be Held July 11, 1956

To the Stockholders of
UTAH OIL REFINING COMPANY:

Notice is hereby given that a Special Meeting of Stockholders of UTAH OIL REFINING COMPANY, a Utah corporation (hereinafter called UTOCO), will be held at Room 704, 10 West Broadway, Salt Lake City, Utah, on Wednesday, July 11, 1956, at the hour of 10 o'clock A.M., Mountain Standard Time, for the following purposes:

(1) to consider and vote for or against (i) the approval of an agreement dated June 11, 1956, between UTOCO and Ten West Broadway Oil Corporation, a Delaware corporation, a copy of which agreement is annexed as Appendix I to the accompanying Proxy Statement, and (ii) the confirmation and approval of the transfer and sale of the assets of UTOCO to said Delaware corporation pursuant to said agreement;

(2) to consider and vote for or against an amendment to the Amended Articles of Incorporation of UTOCO so as to change its name to "Lubra Oil Company" or to some other name dissimilar to "Utah Oil Refining Company";

(3) to consider and vote for or against the liquidation and distribution of the assets of UTOCO and the winding up and dissolution of UTOCO; and

(4) to transact such other business as may properly come before the meeting.

Only stockholders of record at the close of business on June 12, 1956, are entitled to notice of and to vote at such Special Meeting or any adjournment or adjournments thereof.

A. J. BADGER,
President.

Salt Lake City, Utah
June 12, 1956.

UTAH OIL REFINING COMPANY

Proxy Statement

I. PROXY.

The enclosed proxy is being solicited by the management of Utah Oil Refining Company (hereinafter called UTOCO), and will be voted at the Special Meeting of Stockholders on July 11, 1956, and any and all adjournments thereof. It is intended that the proxy will be voted in accordance with any choice specified on the proxy with respect to the matters numbered (1), (2) and (3) thereon. Any proxy may be revoked by the person giving it at any time before it is exercised.

As of June 12, 1956, there were outstanding 1,391,116 shares of Common Stock of UTOCO. At the special meeting each stockholder of record as of the close of business on such date will be entitled to one vote on each matter presented for each share registered in such stockholder's name.

II. PROPOSED TRANSFER OF ASSETS BY, AND LIQUIDATION AND DISSOLUTION OF, UTOCO.

The purpose of the special meeting of stockholders is to consider a series of matters stated in the Notice of Meeting which, if approved, would result in the transfer of all of UTOCO's assets to a newly organized, wholly-owned subsidiary of Standard Oil Company, an Indiana corporation (hereinafter called Standard), and the receipt by UTOCO from such subsidiary of a number of shares of the Capital Stock of Standard sufficient to give each UTOCO stockholder one share of Standard stock for each two shares of UTOCO stock held by him. Under the proposed plan the Standard stock would be distributed to the UTOCO stockholders on the 1-for-2 basis shortly after its receipt by UTOCO and thereupon UTOCO would be dissolved.

Standard owns 1,008,640 shares of the Common Stock of UTOCO. Standard Oil Foundation, Inc., an Indiana charitable corporation (hereinafter called the Foundation), owns 71,380 shares of such Common Stock.

Because of Standard's ownership of more than a majority of the outstanding Common Stock of UTOCO, Standard has, for many years, included UTOCO's assets, liabilities and earnings in the consolidated financial statements of Standard and its subsidiaries presented to its stockholders, with appropriate provisions in such financial statements with respect to the interests of the minority stockholders of UTOCO.

In the opinion of UTOCO's Board of Directors it would be to the advantage of the minority stockholders of UTOCO to substitute for their present minority ownership in UTOCO a direct interest in Standard through the medium of acquiring Capital Stock of Standard. Some of the reasons for this opinion are as follows:

1. Standard's estimated reserves of crude oil and natural gas liquids on a consolidated basis as of December 31, 1955 (see page 7) totaled 2,097 million barrels as contrasted with an estimated 3[illegible] million barrels for UTOCO, which converted to a per share basis for each company as of that date indicate 63.4 barrels per share for Standard against 2.7 barrels per share for UTOCO. It will be noted from the data included in this proxy statement that reserves of crude oil and natural gas liquids are stated in quantities without dollar values.

[fol. 34]

2. Standard's estimated natural gas reserves on a consolidated basis as of December 31, 1955 (see page 7) totaled 11,890 billion cubic feet as compared to an estimated 7.4 billion cubic feet for UTOCO, which converted to a per share basis for each company as of that date would amount to 359.2 thousand cubic feet per share for Standard against 5.3 thousand cubic feet per share for UTOCO. The reserves are also stated in quantities without dollar values.

3. It will also be noted (page 14) that listed securities carried by Standard on a consolidated basis as of December 31, 1955, at a value of $44,848,529 had a market value on that date of $247,239,000, a difference of $202,390,471, while similar figures for UTOCO (page 32) show securities carried on its books consolidated at a value of $977,546 with a market value of $1,840,000, a difference of $862,454. On a comparative per share basis, the excess of market value over the carrying value of such securities would be $6.12 per share for Standard and $0.62 per share for UTOCO.

4. The Capital Stock of Standard is listed on the New York, Midwest and San Francisco Stock Exchanges, and, accordingly, a more active market for the stock is afforded than for the Common Stock of UTOCO, which is dealt in on an over-the-counter basis.

In the opinion of UTOCO's Board of Directors a comparison of data such as these indicate that the proposed ratio of one share of Standard for two shares of UTOCO would be advantageous to UTOCO stockholders from the long-range viewpoint.

Standard heretofore has caused Ten West Broadway Oil Corporation (hereinafter called TENOCO) to be organized under the laws of the State of Delaware as a wholly owned subsidiary of Standard. By an Agreement dated December 16, 1955, Standard has agreed that at the request of TENOCO it will subscribe for 99,800 additional shares of TENOCO's Common Stock and will issue in payment therefor 695,558 shares of the Capital Stock of Standard, having a par value of $25 per share. Such shares of the Capital Stock of Standard are hereinafter sometimes referred to as Standard Stock. TENOCO is authorized to engage in the same kind of business now being carried on by UTOCO and, prior to the closing of the transactions hereinafter described, will be authorized to carry on such business in the State of Utah and the other states in which UTOCO is now qualified as a foreign corporation.

An agreement dated June 11, 1956 (hereinafter called the Agreement), has been entered into between UTOCO and TENOCO under which it is proposed in substance that all of the assets of UTOCO, including its name, trade-marks, business and good will, shall be transferred and sold to TENOCO in consideration of the transfer by TENOCO to UTOCO of the Standard Stock and the assumption by TENOCO of all of the liabilities of UTOCO.

Upon the completion of such transactions UTOCO would distribute the Standard Stock to its stockholders in complete liquidation and would voluntarily dissolve pursuant to the procedures specified under the laws of the State of Utah. The details of such transactions are set forth below.

A. Agreement

The terms of the proposed transfer of UTOCO's assets to TENOCO are set forth in the Agreement, a copy of which is annexed hereto as Appendix 1. The approval of such Agreement and of such transfer and sale will be submitted to a vote of the stockholders as set forth as the matter numbered (1) in the notice of the special meeting. The terms of such transactions and of the Agreement are summarized below.

Upon the approval of the Agreement and such transfer and sale and of the other matters to be submitted to the special meeting of UTOCO stockholders UTOCO will sell, assign, transfer and convey to TENOCO all properties and assets of UTOCO of every kind and nature whatsoever, including its name, trade-marks, business, and good will. In consideration thereof TENOCO will transfer to UTOCO the Standard Stock and will assume all the obligations and liabilities of UTOCO including all of its liabilities arising in connection with the transactions contemplated by the Agreement. At the conclusion of such

transactions the only asset of UTOCO will consist of the Standard Stock. All costs and expenses of carrying out the transactions described in this Proxy Statement, including expenses incident to the dissolution of UTOCO, will be borne by TENOCO so that all of the Standard Stock will be distributable to the UTOCO stockholders.

The Agreement contains certain representations and warranties of both UTOCO and TENOCO. It provides that as a condition to TENOCO's obligations thereunder the Agreement and the transfer and sale of assets as contemplated thereby and the other matters to be presented to the stockholders of UTOCO at the special meeting shall be approved by the affirmative vote of Standard and the holders of more than 50% of the outstanding stock of UTOCO other than Standard and the Foundation. It further provides as a condition to the obligations of both UTOCO and TENOCO, that Standard, UTOCO and TENOCO shall have entered into Closing Agreements with the Commissioner of Internal Revenue in forms satisfactory to them respectively to the effect that the consummation of the transactions contemplated by the Agreement will not result in any taxable gain or deductible loss to Standard, UTOCO or TENOCO. The Agreement further provides that the Standard Stock at the time of the delivery thereof to UTOCO shall have been listed on the New York, Midwest, and San Francisco Stock Exchanges.

Other action is required to be taken by UTOCO under the Agreement subsequent to the consummation of the transfer and sale as set forth below.

B. Amendment of the Amended Articles of Incorporation of UTOCO.

It is anticipated that TENOCO will adopt the name "Utah Oil Refining Company" upon the consummation of the transfer and sale. In order to make this name available to TENOCO, a proposal to change UTOCO's name will be submitted to a vote of the stockholders as set forth in the notice of the special meeting as matter numbered (2). If the transactions are approved as required by the Agreement then upon the completion of the transfer and sale the amendment will be made effective.

C. Distribution of Standard Stock and Dissolution of UTOCO.

If the transactions are all approved as required by the Agreement, it is the intention of UTOCO as soon as practicable after the transfer and sale has been completed, to distribute the Standard Stock to the stockholders of UTOCO prior to its dissolution. These steps require the filing of certain affidavits and other documents with the State Tax Commission and the Secretary of State of Utah, and the publication of certain notices. It is anticipated that such steps will require approximately three weeks time and that the distribution of the Standard Stock may be made to the UTOCO stockholders on or about August 8, 1956. Such distribution will be on the basis of one (1) share of Standard Stock for each two (2) shares of the Common Stock of UTOCO. Following such distribution an appropriate application will be filed in the District Court of Salt Lake County, Utah, seeking voluntary dissolution of UTOCO. Such proceedings, even though authorized, will not be carried out if the transfer and sale of assets is not effected pursuant to the Agreement. In the event that UTOCO, after the Closing Date, shall receive any dividends or other distributions on the Standard Stock UTOCO shall redistribute such dividends or other distributions in full to its stockholders as dividends.

In the distribution of such shares of Standard Stock no fractional shares will be issued, but Standard will issue bearer scrip certificates for any resulting fractional interests, which scrip certificates, when combined with scrip certificates of like import will be exchangeable, within two years after issuance, for the number of full shares of Capital Stock of Standard represented by the scrip certificates surrendered. After two years, Capital Stock of Standard represented by scrip not theretofore surrendered will be sold and during the ensuing three years scrip certificates may be surrendered for cash. Such scrip certificates will not entitle the holder to any voting, dividend or other rights of shareholders, but upon surrender for full shares any dividends or other distributions declared in respect of such full shares between the date of original issuance of such scrip certificates and the date of surrender will be paid to the surrendering holders. After five years such scrip certificates will become void.

D. Tax Consequences of the Transactions.

Under date of May 21, 1956 the Commissioner of Internal Revenue ruled, pursuant to application therefor filed by Standard, that under existing Federal Income Tax laws no gain or loss will be recognized to the stockholders of UTOCO upon the exchange of their UTOCO stock for Standard Stock pursuant to the contemplated transactions, and further that the basis of the Standard Stock in the hands of the UTOCO stockholders will be the same as the basis of the UTOCO stock exchanged therefor. No representation is made with respect to the tax consequences of the transactions under the various State and local laws.

E. Abandonment of Agreement.

Section 8 of the Agreement sets forth certain conditions under which it may, and certain other conditions under which it must, be abandoned and terminated.

III. FINANCIAL INFORMATION.

Attention is called to the financial statements hereinafter set forth. Further financial statements are omitted as not being material in the circumstances for the exercise of prudent judgment in connection with stockholders' action relative to the contemplated transactions.

Summaries of Earnings

The following summaries of earnings of Standard and its subsidiaries consolidated which include Standard's interest in the earnings of UTOCO and its subsidiary consolidated, and of UTOCO and its subsidiary consolidated for the ten years ended December 31, 1955, have been reviewed by Price Waterhouse & Co., independent public accountants, whose opinion thereon is included elsewhere in this Proxy Statement. The data for the three years ended December 31, 1955, should be read in conjunction with the more detailed financial statements and related notes included herein.

STANDARD

(In thousands of dollars)

Years ended December 31	Sales and operating revenues	Profit from operations before depreciation, etc.	Depreciation, depletion, amortization, retirements, and abandonments	Other income	Earnings before interest, taxes on income, etc.	Interest expense	Federal and state taxes on income	Earnings applicable to minority interests	Net earnings (1)(2)	Net earnings per share of Capital Stock (3)	Dividends per share of Capital Stock (4)
1946	$ 650,616	$123,719	$ 49,000	$17,024	$ 91,743	$ 983	$20,867	$2,243	$ 67,650	$2.22	$ 1.[illegible]
1947	910,746	157,900	52,841	12,064	117,123	2,144	22,229	3,655	89,095	2.92	1.[illegible]
1948	1,236,958	253,485	70,894	8,828	191,419	4,489	42,311	4,540	140,079	4.58	1.[illegible]
1949	1,158,125	213,746	80,524	12,158	145,380	6,803	31,976	3,933	102,668	3.36	1.[illegible]
1950	1,302,990	258,563	82,661	15,192	191,094	6,898	55,093	5,522	123,581	4.05	1.[illegible]
1951	1,539,120	320,893	86,972(5)	19,927	253,848	6,103	93,014	6,034	148,697	4.86	1.[illegible]
1952	1,592,122	258,266	95,735(5)	24,773	187,304	8,672	53,240	5,411	119,981	3.91	2.[illegible]
1953	1,709,511	288,437	113,397(5)	19,893	194,933	11,002	53,709	5,396	124,826	4.06	1.[illegible]
1954	1,660,343	269,077	123,131(5)	16,195	162,141	11,301	30,277	3,406	117,157	3.75	2.[illegible]
1955	1,781,318	321,138	139,181(5)	32,636	214,591	11,987	44,257	1,229	157,118	4.81	2.[illegible]

(1) In 1948 the method of accounting for vacations was changed from a payment to an accrual basis and the earnings for 1947 have been charged with payments of $5,786,157 made in 1948 for vacations earned in 1947.

(2) Net earnings for the year 1946 were increased $5,334,000 by the sale of 200,000 shares of Standard Oil Company (New Jersey) stock and 52,400 shares of Consolidated Natural Gas Company stock; for the year 1952, were increased $4,945,000 by the sale of the investment in Taylor Oil and Gas Co. (formerly Petroleum Heat and Power Company); and for the year 1955, were increased $9,235,000 by the sale of an interest in certain producing properties.

(3) Per share earnings were computed on the basis of average shares each year, but after adjustment for the share-for-share distribution of capital stock in 1954.

(4) The dividends shown (which have been adjusted for the share-for-share distribution of capital stock in 1954) include $0.377, $0.344, $0.568, $0.852, $0.760, $0.682, $0.833, and $1.003, respectively, for each of the years 1946 through 1955 as the market values on the dates of distribution of the dividends paid in capital stock of Standard Oil Company (New Jersey).

(5) Includes excess of amortization over normal depreciation on emergency facilities: $225,000 in 1951, $1,343,000 in 1952, $5,513,000 in 1953, $9,956,000 in 1954, and $14,023,000 in 1955.

Dividends have been paid by Standard on its Capital Stock for 63 consecutive years. Annexed hereto as Appendix II is a copy of a letter dated June 30, 1955, from Robert E. Wilson and F. O. Prior, Chairman and President, respectively, of Standard to its stockholders stating the intention of the Board of Directors of Standard as to its dividend policy for the next several years.

UTOCO

(In thousands of dollars)

Years ended December 31	Sales and operating revenues	Profit from operations before depreciation, etc.	Depreciation, depletion, amortization, retirements, and abandonments	Other income (net)	Earnings before interest, taxes on income, etc.	Interest expense	Federal and state taxes on income	Net earnings (1)	Net earnings per share of Capital Stock (2)	Dividends per share of Capital Stock
1946	$26,333	$ 5,058	$ 845	$ 98	$4,311	$169	$1,504	$2,638	$1.90	$ .50
1947	36,531	5,581	1,019	102	4,664	138	1,740	2,786	2.00	.60
1948	46,070	7,027	1,054	131	6,104	150	2,220	3,734	2.68	.60
1949	56 883	7,335	1,256	258	6,337	147	2,291	3,899	2.80	.60
1950	54,982	9,453	1,576	161	8,238	103	3,752	4,383	3.15	1.00
1951	54,625	8,981	1,475	148	7,654	86	4,453	3,115	2.24	1.00
1952	54,061	8,680	1,544	174	7,310	114	3,932	3,264	2.35	1.00
1953	55,568	8,477	1,632	286	7,131	108	3,870	3,153	2.27	1.00
1954	58,354	8,348	1,756	113	6,705	154	3,212	3,339	2.40	1.00
1955	62,283	11,042	1,918	172	9,296	152	4,738	4,406	3.17	1.30

(1) In 1948 the method of accounting for vacations was changed from a payment to an accrual basis and the earnings for 1947 have been charged with payments of $154,708 made in 1948 for vacations earned in 1947.

(2) Per share earnings were computed on the basis of the number of shares issued at the end of the respective years.

IV. STOCK OF STANDARD AND UTOCO.

The issued shares of Capital Stock of Standard are listed on the New York, Midwest and San Francisco Stock Exchanges. The reported high and low sales prices of the Capital Stock of Standard on the New York Stock Exchange for each of the years 1946 to 1953, inclusive, and for each quarterly period during the years 1954 and 1955 and the first quarter of 1956 are set forth in the following table. The Common Stock of UTOCO is not listed on any exchange but is traded on the over-the-counter market. The reported range of the high asked and low bid prices for the Common Stock of UTOCO on such over-the-counter market for the above periods are set forth in the following table.

	Standard Capital Stock*		Utah Common Stock	
	High	Low	High	Low
1946	24⅛	18⅛	17	10½
1947	22⅛	18⅜	16	13
1948	26⅛	18⅞	15	10
1949	22⅛	18⅛	14½	10
1950	30⅜	21⅛	16	14
1951	39¼	29⅛	26½	22
1952	46	35⅜	36¾	24
1953	40¾	32⅛	36	21½
1954 1st Quarter	39⅜	34¼	34	21½
2nd Quarter	41⅛	38⅜	31	26¼
3rd Quarter	47¾	37½	31	28½
4th Quarter	48½	44⅜	36	27
1955 1st Quarter	49⅞	44	29	26
2nd Quarter	53¾	42¾	29	26
3rd Quarter	53¾	48⅜	30	26½
4th Quarter	52⅞	47¾	30	24½
1956 1st Quarter	62½	48½	30½	24

*Adjusted to give effect to the share-for-share distribution made in 1954.

V. BUSINESSES OF STANDARD AND UTOCO.

Standard, together with its subsidiaries, including UTOCO and its subsidiary, constitutes one of the largest oil companies in the United States. It is an integrated operating oil company, being engaged in the exploration for, and the development, production, purchase and transportation of crude oil, and in the manufacture, purchase, transportation and marketing of refined products.

UTOCO is an operating oil company, being engaged principally in the purchase and transportation of crude oil, and in the manufacture, transportation and marketing of refined products. It also participates in exploration for and the development and production of crude oil. UTOCO's subsidiary owns and operates the Utah Oil Building in Salt Lake City, Utah.

The principal products of the companies are gasoline, kerosene, fuel oils, lubricating oils, asphalts and various chemical products. They also sell large quantities of crude oil, liquefied petroleum gases and natural gas.

Production of crude oil, natural gas liquids and natural gas is currently being obtained by Standard and its subsidiaries, including UTOCO, principally from the States of Colorado, Kansas, Louisiana, New Mexico, Oklahoma, Texas and Wyoming. In 1955 this production (net) amounted to 274,100 barrels a day of crude oil and natural gas liquids and 1,086,000 thousand cubic feet a day of natural gas. Production of crude oil is currently being obtained by UTOCO principally from the States of Colorado and Utah, and of natural gas from Wyoming and Colorado. In 1955 this production (net) amounted to [illegible] barrels a day of crude oil and 605 thousand cubic feet a day of natural gas.

Net reserves of crude oil and natural gas liquids of Standard and its subsidiaries, including UTOCO, were estimated as of December 31, 1955, to be 2,097 million barrels of which 226 million barrels were natural gas liquids and net reserves of natural gas were estimated to be 11,890 billion cubic feet. Net reserves of crude oil and natural gas liquids of UTOCO were estimated as of December 31, 1955, to be 38 million barrels of which 351 thousand barrels were natural gas liquids and net reserves of natural gas were estimated to be 7.4 billion cubic feet.

Standard and its subsidiaries, including UTOCO, owned approximately 9,600 miles of crude oil pipelines (exclusive of about 5,220 miles of gathering lines), approximately 2,420 miles of product pipelines and 160 miles of natural gas pipelines at December 31, 1955. UTOCO owned approximately [illegible] miles of crude oil pipelines (exclusive of about 77 miles of gathering lines), and 6 miles of product pipelines.

Standard owns 5 lake tankers with an aggregate deadweight tonnage of 34,650 tons and a subsidiary owns 9 ocean-going tankers with an aggregate deadweight tonnage of 140,886 tons.

Refined products of Standard and its subsidiaries are currently being obtained principally from owned refineries located at Whiting, Indiana; Sugar Creek, Missouri; Wood River, Illinois; Mandan, North Dakota; Neoglesha, Kansas; Casper, Wyoming; Baltimore, Maryland; Savannah, Georgia; Texas City, Texas; Eldorado, Arkansas; and Destrehan, Louisiana; as well as from the refinery of UTOCO at Salt Lake City, Utah. Such refineries of Standard and its subsidiaries, including UTOCO, had an average daily input of crude oil and natural gas liquids in 1955 of approximately 601,500 barrels. UTOCO's refinery had an average daily input in the same period of approximately 28,200 barrels.

Standard and its subsidiaries market their products extensively throughout most of the United States. Motor gasolines are sold under various brand names such as STANDARD RED CROWN, STANDARD WHITE CROWN, PAN-AM, AMOCO, and AMERICAN; motor oils under various brand names such as PERMALUBE, STANOLUBE, POLARINE, and AMOCO; and domestic heating oils under various brand names such as STANDARD FURNACE OIL and STANDARD HEATER OIL. UTOCO conducts its marketing operations in the States of Idaho, Nevada, Oregon, Utah and Washington, with gasoline under the brand name UTOCO, and motor oils under the brand names UTOCO and PEAK-LUBE.

Standard, together with its subsidiaries, including UTOCO, supply a total of approximately 30,140 retail outlets, including about 4,830 service stations which they own and approximately 11,100 which they lease. Except for a few company operated training stations, all these retail outlets are operated by independent dealers. Such companies also own and operate over 4,400 bulk plants from which service stations and consumer accounts, principally farms, are supplied by tank trucks. UTOCO supplies a total of about 700 retail outlets, including about 240 service stations which it owns and approximately 430 which it leases. UTOCO also owns and operates about 80 bulk plants from which retail outlets and consumer accounts are supplied.

VI. CERTAIN MINORITY STOCKHOLDERS OF UTOCO.

A group of stockholders of UTOCO owns an aggregate of 140,519 shares of the Common Stock of UTOCO. If the liquidation of UTOCO becomes effective, such UTOCO stockholders will receive for their UTOCO Common Stock shares of Standard Stock, as follows:

Name	Shares of UTOCO Common Stock	Shares of Standard Stock*
Bennett Association	30,000	15,000
David W. Bennett	100	50
Frances G. Bennett	400	200
H. H. Bennett	2,000	1,000
Richard S. Bennett	3,500	1,750
Robert F. Bennett	100	50
Rosetta W. Bennett	200	100
Wallace F. Bennett	2,000	1,000
Wallace G. Bennett	150	75
J. D. Campbell	1,000	500
May N. Doscher	475	237
John L. Firmage	250	125
Rosemary B. Fletcher	100	50
Lois M. Greenwood	897	448
M. J. Greenwood	1,421	710
Mattie Wattis Harris	917	458
William H. Harris	10,000	5,000
Phyllis G. Harvey	930	465
Ruth Harris Hite	777	388
Edward S. Holt	4,540	2,270
Reed E. Holt	500	250
Frances B. Jeppson	100	50
Elise F. Musser	1,407	703
Samuel C. Powell	750	375
Mabel W. Reynolds	100	50
Stephen L. Richards	584	292
Katherine E. Sage	4,450	2,225
Hilda Sandmann	400	200
Aurelia H. Schettler, Trustee under Declaration of Trust dated June 24, 1955, with Catherine A. Lowe Hampton	135	67

Name	Shares of UTOCO Common Stock	Shares of Standard Stock*
Dan B. Shields	1,200	600
George Smith	400	200
Mary B. Smith	1,500	750
Genevieve Stafford	1,892	946
Harold B. Stafford	1,992	996
Tracy-Collins Trust Co.	4,331	2,165
Tracy-Collins Trust Co., Guardian of the Estate of Sabina Degnan	150	75
Tracy-Collins Trust Co., Guardian of the Estate of A. J. Duquesne	667	333
Walker Bank & Trust Co., Trustee under the Will of James J. Burke, Deceased	250	125
Walker Bank & Trust Co., Trustee under deed of Trust dated November 1, 1948 with Charles B. Petty and Maggie C. Petty	100	50
Walker Bank & Trust Co., Executor of the Estate of Margaret Burke Raleigh, Deceased	549	274
Walker Bank & Trust Co., Executor of the Estate of Emma R. Selbach, Deceased	800	400
Walker Bank & Trust Co., Trustee under Will of Ernest A. Tripp, Deceased	425	212
A. C. Wallace	3,856	1,928
Elen Wallace	300	150
Henry A. Wallace, Jr.	200	100
Ina Claire Wallace	480	240
John M. Wallace	45,814	22,907
John M. Wallace, Jr.	20	10
M. Elen Wallace	50	25
William R. Wallace	2,874	1,437
William R. Wallace, Jr.	3,161	1,580
Elizabeth B. Winters	1,325	662

*Excluding fractional interests for which bearer scrip certificates will be issued.

Standard and such UTOCO stockholders have mutually agreed to vote or cause to be voted all the shares of Common Stock of UTOCO owned by them respectively in favor of each of the matters numbered (1), (2) and (3) respectively in the Notice of Meeting and Proxy at the special meeting of stockholders of UTOCO.

Pursuant to application therefor filed by Standard, the Commissioner of Internal Revenue ruled that the transactions herein contemplated will not result in the realization of gain or loss by Standard, UTOCO, TENOCO, or the stockholders of UTOCO, and tendered Closing Agreements for execution by the respective corporations confirming such ruling. The Closing Agreements have been approved and executed by the respective corporations and returned to the Commissioner for his signature. If the Closing Agreements shall not have been executed by the Commissioner prior to the time the stockholders of UTOCO shall vote on the approval of the agreement and the transfer and sale contemplated thereby, Standard and the above listed UTOCO stockholders have agreed to vote their respective shares of Common Stock

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UTOCO at such meeting for the rejection of all of the above matters numbered (1), (2) and (3). It is expected that the Closing Agreements will have been executed and returned by the Commissioner prior to July 11, 1956, the date upon which the special meeting will be convened. If the Closing Agreements have not been so executed and returned, the special meeting may be adjourned pending receipt of the executed Closing Agreements.

VII. MISCELLANEOUS.

As pointed out above the Agreement provides that none of the matters to be considered at the special meeting will be made effective unless all such matters are approved not only by Standard but also by the holders of more than 50% of the outstanding shares of stock of UTOCO other than shares held by Standard and the Foundation. The majority so specified is substantially in excess of the vote required in respect of each of such matters under the applicable provisions of the Utah Code Annotated.

In addition to the solicitation of proxies by use of the mails, certain officers and regular employees of UTOCO may solicit proxies by personal interview, mail, telephone or telegraph and may request brokerage houses and other custodian nominees and fiduciaries to forward soliciting material to the beneficial owners of stock. UTOCO also will reimburse brokers and their nominees for their expenses in forwarding soliciting material to the beneficial owners of stock held of record by such parties.

The Utah Code Annotated makes no provision with respect to rights of appraisal or similar rights of any stockholders who dissent to the proposed transactions described in this Proxy Statement.

At the date hereof the management of UTOCO knows of no matter not specifically set forth in the notice of special meeting to be presented for action at the meeting. In the event that any other matter properly comes before the meeting or any adjournment thereof, it is intended that the persons named in the accompanying form of proxy and acting thereunder will vote in accordance with their judgment.

If you cannot attend the meeting, please fill in, execute and return the enclosed proxy in the addressed envelope provided, which requires no postage if mailed in the United States. Your cooperation in giving this matter your immediate attention will be appreciated.

By order of the Board of Directors.

UTAH OIL REFINING COMPANY

June 12, 1956.

OPINION OF INDEPENDENT PUBLIC ACCOUNTANTS

To—

STANDARD OIL COMPANY (INDIANA):
UTAH OIL REFINING COMPANY:

In our opinion, the accompanying financial statements (listed in the foregoing index) present fairly the financial position of Standard Oil Company (Indiana), of that company and its subsidiaries consolidated, of Utah Oil Refining Company, and of that company and its subsidiary consolidated, as at December 31, 1955, and the results of their operations for the three years then ended, in conformity with generally accepted accounting principles applied on a consistent basis throughout the period. Our examinations of the statements for the three years ended December 31, 1955 were made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

We have made similar examinations of the consolidated financial statements of Standard and its subsidiaries consolidated, and of Utah and its subsidiary consolidated, for the years 1946 to 1952, inclusive, and in our opinion, the information set forth under the heading "Summaries of Earnings" for the ten years ended December 31, 1955 fairly summarizes the results from their operations for that period.

PRICE WATERHOUSE & CO.

Chicago, Illinois
February 24, 1956

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APPENDIX I

AGREEMENT BETWEEN UTAH OIL REFINING COMPANY AND TEN WEST BROADWAY OIL CORPORATION

THIS AGREEMENT entered into, as of the 11th day of June, 1956, by and between UTAH OIL REFINING COMPANY, a Utah corporation (hereinafter called "UTOCO"), and Ten West Broadway Oil Corporation, a Delaware corporation (hereinafter called "TENOCO"),

WITNESSETH:

UTOCO has an authorized capital of $7,500,000 divided into 1,500,000 shares of Common Stock, of the par value of $5 per share, of which 1,391,116 shares are issued and outstanding. Of such issued and outstanding shares, 1,008,640 shares (approximately 72.51%) are owned by Standard Oil Company, an Indiana corporation (hereinafter called "Standard"), 382,476 shares (approximately 27.49%) are owned by approximately 995 other stockholders of UTOCO. TENOCO, which is a wholly owned subsidiary of Standard, proposes that the corporate name and all of the assets of UTOCO be transferred and sold to TENOCO, and that in consideration thereof, TENOCO shall transfer to UTOCO 695,558 shares of the Capital Stock of Standard, having a par value of $25 per share (which shares are hereinafter called "Standard Stock"), and shall assume all of the liabilities of UTOCO. UTOCO proposes that, upon the consummation of such transfer and sale, UTOCO will change its corporate name, will distribute the Standard Stock to the stockholders of UTOCO in complete liquidation, and thereafter will voluntarily dissolve, all such action to be subject to the approval of the stockholders of UTOCO.

It is intended hereby to set forth the terms of and the conditions upon which such transfer and sale shall be carried out, and the procedures under which the change of name and the complete liquidation and dissolution of UTOCO shall be accomplished.

Now, THEREFORE, it is agreed:

1. *Representations and Warranties of TENOCO.* TENOCO hereby represents and warrants to UTOCO as follows:

(a) TENOCO is a corporation duly organized and existing and in good standing under the laws of the State of Delaware, and has the corporate power to enter into this Agreement and to acquire the assets and assume the liabilities of UTOCO as provided herein.

(b) Standard, by agreement dated December 16, 1955, has agreed with TENOCO that, at the request of TENOCO, Standard will subscribe for additional stock of TENOCO and will issue and deliver the Standard Stock in payment thereof; and that all of the shares of Standard Stock, when so delivered, will be of the same class and have the same rights as the shares of Capital Stock of Standard presently outstanding, will be duly issued, fully paid up and nonassessable, and will be listed on the New York, Midwest, and San Francisco Stock Exchanges.

(c) The Board of Directors of TENOCO has approved this Agreement and transactions contemplated herein, and has authorized the execution and delivery hereof by TENOCO.

2. *Representations and Warranties of UTOCO.* UTOCO hereby represents and warrants to TENOCO as follows:

(a) UTOCO is a corporation duly organized and existing and in good standing under the laws of the State of Utah, and has the corporate power to own its properties and to carry on its business as now being conducted.

(b) UTOCO has an authorized capital of $7,500,000 divided into 1,500,000 shares of Common Stock of the par value of $5 per share, of which 1,391,116 shares are issued and outstanding, and 108,884 shares are authorized but unissued.

(c) UTOCO has furnished to TENOCO the following financial statments: the consolidated balance sheets of UTOCO and subsidiary company as of December 31, 1955, and the consolidated statements of income and of capital in excess of par value of capital stock and earnings retained and invested in the business for the three years ended December 31, 1955, duly certified by Price Waterhouse & Co. The balance sheets fairly represent the consolidated financial condition of UTOCO and its subsidiary company as at the dates thereof, and the consolidated results of and operations for the periods indicated in conformity with generally accepted accounting principles applied on a consistent basis. Since December 31, 1955, there has been no material adverse change in the consolidated financial condition of UTOCO, and its subsidiary company, other than changes incurred in the ordinary course of business.

(d) Since December 31, 1955, neither UTOCO nor its subsidiary company (i) has issued any stock, bonds or other corporate securities; (ii) incurred any obligation or liability absolute or contingent except current liabilities incurred and obligations under contracts entered into in the ordinary course of business; (iii) redeemed any of its shares of Common Stock or declared or made any payment or distribution to stockholders of UTOCO other than an extra dividend of thirty cents ($0.30) per share paid on January 16, 1956, the regular dividend of twenty-five cents ($0.25) per share paid on March 15, 1956 and a regular dividend of twenty-five cents ($0.25) per share declared on May 22, 1956 payable on June 15, 1956; (iv) mortgaged, pledged or subjected to lien or any other encumbrance any of its assets, tangible or intangible, except in each case in the ordinary course of business or (v) sold or transferred any of its tangible assets or cancelled any debts or claims except in each case in the ordinary course of business.

(e) The Board of Directors of UTOCO has approved this Agreement and transactions contemplated herein, and has authorized the execution and delivery hereof by UTOCO.

3. *Action to Be Taken by UTOCO.*

(a) Promptly upon the execution of this Agreement, UTOCO will mail to its stockholders notice of the special meeting of such stockholders, heretofore called by the Board of Directors of UTOCO, to be convened on July 11, 1956 (which meeting may be adjourned from time to time), to take action upon the following proposals:

(i) The approval of this Agreement and the transfer and sale by UTOCO to TENOCO of all assets of UTOCO, including its name, trade-marks, business and good will, in exchange for the Standard Stock and the assumption by TENOCO of all the obligations and liabilities of UTOCO including all of its liabilities arising in connection with the transactions contemplated by this Agreement.

(ii) The approval of the amendment of the Amended Articles of Incorporation of UTOCO to change the name of UTOCO to some name wholly dissimilar to "Utah Oil Refining Company".

(iii) The approval of the liquidation and voluntary dissolution of UTOCO.

(iv) The approval of the distribution of the assets of UTOCO (consisting of the Standard Stock) prior to decree of court of the voluntary dissolution.

(b) UTOCO further agrees to use reasonable efforts to obtain the favorable vote of the holders of more than 50% of the outstanding stock of UTOCO other than Standard and Standard Oil Foundation, Inc., to approve the proposals referred to in subparagraph (a) of this Section 3.

(c) If the stockholders of UTOCO shall approve the proposals referred to in subparagraph (a) of this Section 3, UTOCO shall:

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(i) take all steps necessary to effect the transfer and sale to TENOCO of UTOCO's assets, including its name, trade-marks, business and good will, all as contemplated by this Agreement, provided, however, that a blanket transfer and assignment shall constitute compliance with subparagraph (d) of Section 8 hereof,

(ii) take all steps necessary to effect the change of its corporate name pursuant to the approved form of amendment of its Amended Articles of Incorporation; such action to be completed in Utah within two full business days after the completion of the transfer and sale of UTOCO's assets to TENOCO and in the other states in which UTOCO is qualified to do business as soon as conveniently practicable, and

(iii) take all steps necessary to effect the liquidation and voluntary dissolution of UTOCO and the distribution of the assets of UTOCO; such action to be completed as soon as reasonably possible after the completion of said transfer and sale of UTOCO's assets to TENOCO.

(d) In the event that UTOCO, after the Closing Date, shall receive any dividends or other distributions on the Standard Stock, UTOCO shall redistribute such dividends or other distributions in full to its stockholders as dividends.

4. *Action to Be Taken by TENOCO.*

(a) If the Standard Stock shall not theretofore have been issued to TENOCO, then promptly after the stockholders of UTOCO have approved the proposals referred to in subparagraph (a) of Section 3 of this Agreement, TENOCO shall request Standard to issue the Standard Stock and shall take all steps which are necessary to be taken by TENOCO to obtain delivery thereof.

(b) TENOCO shall take all steps necessary to complete the acquisition of the assets of UTOCO and to assume the liabilities of UTOCO all as contemplated by this Agreement.

5. *The Closing.*

(a) The closing will take place at the offices of UTOCO, 10 West Broadway, Salt Lake City, Utah, on July 13, 1956, or at such other time, date and place or places as shall be fixed by mutual agreement of the parties (herein referred to as the "Closing Date").

(b) On the Closing Date, subject to the terms and conditions contained in this Agreement,

(i) in consideration of the action to be taken by UTOCO under subdivision (iii) of this subparagraph (b), TENOCO will transfer to UTOCO the Standard Stock.

(ii) TENOCO will assume all of the obligations and liabilities of UTOCO, including all of its liabilities in connection with the transactions contemplated by this Agreement, whether arising before or after the closing.

(iii) UTOCO will sell, assign, transfer and convey to TENOCO all properties and assets of UTOCO of every kind and nature whatsoever, including its name, trade-marks, business and good will.

(c) The Standard Stock shall be represented by one certificate registered in the name of TENOCO with proper stock power or other instruments of transfer.

(d) UTOCO agrees that the transfer of its properties and assets shall be by deeds, bills of sale, assignments or other instruments of transfer as shall be appropriate to carry out the intent of this Agreement and sufficient to convey all of the title of UTOCO to the respective properties and assets. In the case of assignments of leases or other instruments requiring the consent of another party thereto, UTOCO agrees to use its best efforts to obtain such written consent. UTOCO further agrees that it will execute and deliver to TENOCO on and after the Closing Date, such other instruments, and do and perform all such other acts as may reasonably be required by TENOCO fully to convey and

transfer to, and vest in TENOCO, and protect its right, title and interest in and enjoyment of, all of the assets and property of UTOCO intended to be assigned, transferred and conveyed pursuant to the provisions hereof, including any assets and property received after the Closing Date other than the Standard Stock and any dividends or other distributions in respect thereof.

(e) UTOCO shall deliver or cause to be delivered at the time of the closing all books, papers and records of UTOCO except stock books and stock registers, and such other books, papers, and records as do not relate to the properties or operations of UTOCO.

(f) TENOCO, subject to the conditions herein set forth, shall indemnify UTOCO against, and hold it harmless from, all liabilities of UTOCO.

6. *Conditions to Obligations of TENOCO.* The obligations of TENOCO hereunder are subject to the conditions that at or before the Closing Date:

(a) At the special meeting of stockholders of UTOCO heretofore called by its Board of Directors to be convened on July 11, 1956 (which meeting may be adjourned from time to time), the proposals referred to in subparagraph (a) of Section 3 of this Agreement are approved by the affirmative vote of Standard and the holders of more than 50% of the outstanding stock of UTOCO other than that held by Standard and Standard Oil Foundation, Inc.

(b) Standard and TENOCO shall have entered into Closing Agreements with the Commissioner of Internal Revenue in forms satisfactory to them respectively to the effect that the transactions contemplated hereby will not result in any taxable gain or deductible loss to Standard or to TENOCO.

(c) The representations and warranties made by UTOCO herein shall be true as of the Closing Date, with the same force and effect as though such representations and warranties had been made as of the Closing Date except to the extent that such representations and warranties shall be untrue as of the Closing Date because of (i) events or changes (not materially adversely affecting the business, property or financial condition of UTOCO, provided that operating losses shall not be deemed to have any such material adverse effect) occurring or arising after the date hereof in the ordinary course of business of UTOCO, or (ii) the declaration and payment by UTOCO of additional regular quarterly cash dividends not exceeding with respect to each such dividend twenty-five cents ($0.25) per share, provided, however, that in no event shall UTOCO declare a third regular quarterly cash dividend in 1956 prior to July 14, 1956.

(d) TENOCO shall have received an opinion of counsel for UTOCO, dated the Closing Date, in form satisfactory to TENOCO, to the effect that (i) UTOCO is duly incorporated under the laws of the State of Utah, is authorized to carry on its business in that State, and is qualified as a foreign corporation and authorized to carry on its business in the States of Arizona, Colorado, Idaho, Nevada, Oregon, Washington and Wyoming; (ii) UTOCO has full power and authority to sell, convey, assign, transfer and deliver its assets, including its name, trade-marks, business and good will to TENOCO as herein provided; (iii) all corporate and other proceedings required to be taken by, or on the part of, UTOCO to authorize it to carry out this Agreement and so to sell, convey, assign, transfer and deliver its assets, including its name, trade-marks, business and good will, have been duly and properly taken, and (iv) the respective votes of the stockholders of UTOCO taken at the special meeting provided for in paragraph (a) of this Section 6, meet the requirements of this Agreement.

7. *Conditions to Obligations of UTOCO.* The obligations of UTOCO hereunder are subject to the conditions that on or before the Closing Date:

(a) The stockholders of UTOCO shall have approved the proposals referred to in subparagraph (a) of Section 3 in the manner provided by subparagraph (a) of Section 6 of this Agreement.

(b) TENOCO shall be a duly organized and existing corporation authorized to do business in Delaware, the state of its incorporation, and in the State of Utah, and authorized to acquire the

assets of UTOCO and to assume all of the obligations and liabilities of UTOCO as contemplated by this Agreement.

(c) TENOCO shall have acquired the Standard Stock.

(d) The representations and warranties made by TENOCO herein shall be true as of the Closing Date, with the same force and effect as though such representations and warranties had been made as of the Closing Date.

(e) UTOCO shall have entered into a Closing Agreement with the Commissioner of Internal Revenue in form satisfactory to UTOCO to the effect that the transactions contemplated hereby will not result in any taxable gain or deductible loss to UTOCO.

(f) UTOCO shall have received an opinion of counsel for TENOCO, dated the Closing Date, in form satisfactory to UTOCO, to the effect that (i) TENOCO is duly incorporated under the laws of the State of Delaware, and is authorized to carry on its business in that state and in the State of Utah, (ii) TENOCO has full power and authority to enter into this Agreement and to acquire the assets of UTOCO and to assume all of the obligations and liabilities of UTOCO as provided in this Agreement, and (iii) all corporate and other proceedings required to be taken by or on the part of TENOCO to authorize it to carry out this Agreement and to purchase the assets of UTOCO and to assume UTOCO's liabilities have been duly and properly taken.

(g) UTOCO shall have received an opinion of counsel for Standard, dated the Closing Date, in form satisfactory to UTOCO, to the effect that (i) Standard has full power and authority to issue the Standard Stock to TENOCO and all corporate and other proceedings required to be taken on the part of Standard to authorize the issuance thereof, have been duly and properly taken, and (ii) the Standard Stock has been duly issued and is fully paid up and nonassessable.

(h) The Standard Stock at the time of the delivery thereof shall have been listed on the New York, Midwest and San Francisco Stock Exchanges.

8. *Abandonment and Termination.* TENOCO and UTOCO may, by mutual consent evidenced by resolutions of their respective Boards of Directors, abandon and terminate this Agreement at any time prior to the closing hereunder, without liability on the part of either party or its directors, officers or stockholders to the other. Either party by action of its Board of Directors may abandon and terminate this Agreement at any time prior to action taken by the stockholders of UTOCO, as contemplated by subparagraph (a) of Section 6 hereof, without liability on the part of such party or its directors, officers or stockholders to the other party.

This Agreement shall in any event be abandoned and terminated without liability on the part of either party hereto, or their respective directors, officers or stockholders, unless prior to December 1, 1956 (which date may be extended from time to time by mutual consent of the parties hereto evidenced by resolutions of their respective Boards of Directors), all of the following events shall have occurred:

(a) all of the Closing Agreements mentioned in subparagraph (b) of Section 6 hereof and subparagraph (e) of Section 7 hereof shall have been entered into;

(b) the stockholder approvals required in subparagraph (a) of Section 6 of this Agreement shall have been given;

(c) the Standard Stock shall have been listed on the New York, Midwest and San Francisco Stock Exchanges; and

(d) the transfer and sale of the assets of UTOCO pursuant to the provisions of this Agreement shall have taken place.

9. *Notices.* Any notices to be given hereunder by either party hereto to the other shall be in writing and delivered personally or sent by registered mail, postage prepaid, if to TENOCO addressed to TENOCO, 910 South Michigan Avenue, Chicago, Illinois, and if to UTOCO addressed to UTOCO 10 West Broadway, Salt Lake City, Utah.

In Witness Whereof, the parties hereto have caused this Agreement to be executed in their respective corporate names by their respective presidents or one of their respective vice-presidents thereunto duly authorized, and their respective corporate seals to be hereunto affixed and attested by their respective secretaries or one of their respective assistant secretaries, as of the day and year first above written.

TEN WEST BROADWAY OIL CORPORATION

(Seal)

By Merwin Bristol
President.

Attest:

Hunter L. Johnson, Jr.
Secretary.

UTAH OIL REFINING COMPANY

(Seal)

By A. J. Badger
President.

Attest:

J. Floyd Stoker
Secretary.

[fol. 80]

APPENDIX II

STANDARD OIL COMPANY
(INDIANA)

EXECUTIVE OFFICES

910 SOUTH MICHIGAN AVENUE
CHICAGO 80, ILLINOIS

June 30, 1955

To Our Stockholders:

Some of our stockholders have asked that we clarify our policy with regard to the portion of our total dividends which we have been paying in Standard Oil Company (New Jersey) stock.

Our Company has declared such special dividends (in addition to quarterly cash dividends) once each year for the past seven years. Owners who held enough shares of our stock to entitle them to one or more full shares of the Jersey stock have received such stock; owners whose holdings would otherwise entitle them to fractional shares have received equivalent payments in cash.

Many financial publications, in listing or tabulating dividends, either ignore this special payment or merely list our regular cash dividends with a footnote: "plus stock dividend." Such a footnote generally means only a distribution of some additional shares of a company's own stock. The result is that our Company's total dividend payments are often interpreted as being substantially lower than they are.

No board of directors can make binding commitments as to future dividend policy, which will necessarily be affected by a variety of considerations not known in advance. However, your board feels that it can properly point out to stockholders the reasoning behind its dividend policy over the past seven years and its present thinking with regard to future declarations.

In order to build up crude oil reserves and keep up with the rapidly growing demand for improved petroleum products, the plowing back of a substantial portion of earnings has been, and probably will continue to be, essential in our industry. Over the past ten years we have paid out as dividends a slightly larger percentage of earnings than that paid by the industry as a whole. In each of the past seven years a special dividend, of variable amount, in Jersey stock has been used to bring the total payments to the desired level.

For the seven years, 1945 through 1951, our total dividend payments averaged 37.9 percent of earnings as compared with a weighted average of 37.7 percent of earnings paid out by the thirty largest oil companies. For the last three years the Company has tried to bring its total dividend declaration up to about 50 percent of earnings and it has actually averaged 51.6 percent as compared with a weighted average of 44.3 percent for the thirty companies.

The percentage of income paid out has, however, fluctuated considerably from year to year, partly because it is impossible to know on the declaration date what the market price of Jersey stock will be on the date of distribution about seven weeks later, and partly because five out of seven of our special dividends have been declared in the third quarter when it was too early to approximate our probable earnings for the full year.

In view of the foregoing, your directors have decided to authorize this statement of their present intention as to dividend policy for the next several years. That present intention is to continue to sup-

plement regular cash dividends by a special dividend in an amount sufficient to bring our total dividend declaration in any year to about 50 percent of that year's earnings.

In order to approximate this percentage more closely, your board intends to declare such future special dividends *in the fourth quarter*. Ordinarily such special dividends will be in the form of Standard Oil Company (New Jersey) stock, with compensating cash payments in lieu of fractional shares. Declaring the special dividend in this form has the advantages of conserving cash, of saving capital gains taxes to the Company, and of giving stockholders receiving the Jersey stock the option of either holding a valuable stock or selling it to augment their cash income.

Very truly yours

ROBERT E. WILSON
Chairman

F. O. PRIOR
President

[fol. 82]

COLLECTIVE EXHIBIT "C"

Utah Oil Refining Company

UTAH OIL BUILDING

Salt Lake City 10, Utah July 17, 1956

O THE STOCKHOLDERS OF UTAH OIL REFINING COMPANY, A UTAH CORPORATION, HICH BY AMENDMENT TO ITS ARTICLES OF INCORPORATION IS NOW NAMED UBRA OIL COMPANY:

A special meeting of the stockholders of your Company was held pursuant notice at the offices of the Company, at Room 704, 10 West Broadway, Salt Lake ity, Utah, on Wednesday, July 11, 1956, at ten o'clock a. m., Mountain Standard ime.

1,391,116 shares of the stock of the Company were issued and outstanding nd entitled to vote at the meeting. 1,352,608 shares, or 97.2% of the stock, ere represented at the meeting by stockholders in person or by proxy. 1,336,880 hares were voted for, and 15,728 shares were voted against, the adoption of esolutions with respect to:

(1) The transfer and sale of the assets of the Company;

(2) The change of the name of the Company to Lubra Oil Company; and

(3) The liquidation and dissolution of the Company.

opies of these resolutions as approved by the shareholders are enclosed herewith.

This letter and the accompanying copies of resolutions are being mailed o all shareholders of the Company, and particularly to those shareholders of ecord who did not participate in person or by proxy in the meeting when the esolutions were adopted.

It is anticipated that the withdrawal and distribution of the assets of he Company, in accordance with the resolutions, will take place on or about ugust 8, 1956.

In the near future you will receive a letter explaining the procedures o be followed in connection with the distribution of the assets.

Yours truly,

H. J. Daugherty

President, Utah Oil Refining Company, a Utah Corporation, which by amendment to its Articles of Incorporation is now named Lubra Oil Company

COLLECTIVE EXHIBIT "C"

RESOLUTIONS ADOPTED BY THE SHAREHOLDERS OF UTAH OIL REFINING COMPANY (WHICH BY AMENDMENT TO ITS ARTICLES OF INCORPORATION IS NOW NAMED LUBRA OIL COMPANY) AT A SPECIAL MEETING OF THE SHAREHOLDERS HELD ON JULY 11, 1956

1. Concerning the transfer and sale of the assets:

RESOLVED, That after the transfer and sale by Utah Oil Refining Company of all of its assets to Ten West Broadway Oil Corporation pursuant to and in accordance with the terms of the Agreement dated June 11, 1956, which Agreement and the transfer of assets to be consummated pursuant thereto have been confirmed and approved by the stockholders of Utah Oil Refining Company at this Special Meeting, the Company liquidate and distribute its assets resulting from the consummation of such transactions, wind up its affairs and dissolve.

RESOLVED, That after the transfer and sale by the Utah Oil Refining Company of all of its assets to Ten West Broadway Oil Corporation, pursuant to and in accordance with the terms of the Agreement dated June 11, 1956, and prior to the entry of a decree of court of competent jurisdiction dissolving the Company, the assets and property of the Company then owned by it be withdrawn and distributed pro rata to the stockholders of the Company provided, however, that in the course of such pro rata distribution, the 695,558 shares of the capital stock of Standard Oil Company, an Indiana corporation, to be received by Utah Oil Refining Company in the consummation of the aforementioned transactions shall be distributed to the stockholders of the Company on the basis of one share of such capital stock of Standard Oil Company for each two shares of the outstanding common stock of the Company.

2. Concerning the change of the name:

RESOLVED, That the name of Utah Oil Refining Company be changed to Lubra Oil Company, and that ARTICLE I of the Amended Articles of Incorporation of Utah Oil Refining Company be changed to be and read as follows:

"ARTICLE I

The name of this corporation shall be Lubra Oil Company."

3. Concerning the liquidation and dissolution:

RESOLVED, That the Agreement dated June 11, 1956, between Utah Oil Refining Company and Ten West Broadway Oil Corporation, a Delaware corporation, pursuant to the terms of which Utah Oil Refining Company would transfer and sell to Ten West Broadway Oil Corporation all of the assets and property of Utah Oil Refining Company, including its name, trademarks, business and good will, in consideration of: (i) 695,558 shares of the capital stock of Standard Oil Company, an Indiana corporation, having a par value of $25.00 per share, and (ii) the assumption by Ten West Broadway Oil Corporation of all of the liabilities of Utah Oil Refining Company, including all debts and taxes owing by and claims and demands against Utah Oil Refining Company, and the acts of the officers of the Utah Oil Refining Company in executing and delivering said Agreement for and on its behalf, be and the same are in all respects confirmed and approved.

RESOLVED, That the transfer and sale of all the assets and property of Utah Oil Refining Company to Ten West Broadway Oil Corporation, pursuant to the terms of the Agreement dated June 11, 1956, a copy of which was presented to this meeting, hereby in all respects authorized, confirmed and approved, and the officers of Utah Oil Refining Company are hereby authorized and directed to carry into effect the provisions of said Agreement and to consummate such transfer and sale in the manner and for the consideration set forth in said Agreement.

[fol. 84]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

OTTO BEHIMER and JOHN A. ROBERTS,

Plaintiffs,

vs.

STANDARD OIL COMPANY, an Indiana corporation, and STANDARD OIL FOUNDATION, INC., an Indiana charitable corporation,

Defendants.

ANSWER AND MOTIONS TO DISMISS OF STANDARD OIL FOUNDATION, INC.—Filed March 10, 1958

Now comes STANDARD OIL FOUNDATION, INC., an Indiana charitable corporation, by Weymouth Kirkland, Howard Ellis, John C. Butler, and Louis J. Keating, its attorneys, and for answer to the Complaint of Otto Behimer and John A. Roberts, says:

1. This defendant adopts as its own, and incorporates by reference as if fully set out herein, the answer and exhibits thereto of defendant Standard Oil Company to the Complaint of Otto Behimer and John A. Roberts.

2. This defendant further states that it is a charitable corporation, organized unde and pursuant to the provisions of the Indiana General Not for Profit Corporation Act, Acts 1935, Ch. 157, S. 1 et seq., as amended (Title 25, Chapter 5, Burns Indiana Statutes Annotated), to promote educational, charitable, scientific and literary purposes.

[fol. 85] 3. This defendant further states that it held, pursuant to the purposes for which it was organized, 71,380 shares of stock of Utah Oil Refining Company, a Utah corporation, for which it received in exchange 35,690 shares of the capital stock of defendant Standard Oil Company, pursuant to the proposals set forth in the notice and proxy statement attached as Exhibit B to the answer of said defendant.

4. Defendant moves to dismiss this suit, insofar as it may purport to be a derivative or secondary action by shareholders pursuant to Rule 23 (b) of the Federal Rules of Civil Procedure, for the following reasons;

A. The failure to join Utoco (by change of name Lubra Oil Company) as a party to this suit, such corporation being an indispensable party.

B. The failure of plaintiffs to verify their complaint under oath, as required by Rule 23 (b) of the Federal Rules of Civil Procedure.

C. The failure of plaintiffs to set forth with particularity their efforts to secure from the Utoco shareholders such action as they desire, as required by Rule 23 (b) of the Federal Rules of Civil Procedure.

[fol. 86] D. The absence of Tenoco (by change of name Utah Oil Refining Company, a Delaware corporation) as a party to this suit, such corporation being the purchaser and transferee of the assets of Utoco.

E. The failure of plaintiffs to allege a derivative or secondary cause of action.

5. Defendant moves to dismiss this suit, insofar as it may purport to be an action pursuant to rule 23 (a) (1) of the Federal Rules of Civil Procedure, for the following reasons:

A. The Complaint fails to allege facts showing that the plaintiffs are proper representatives of, or will adequately represent, the class on whose behalf they purport to sue and, on the contrary, they are not such representatives of the class described in the Complaint so as to entitle them to maintain this action.

B. The class which plaintiffs purport to represent does not in fact exist.

C. The class which plaintiffs purport to represent, if such can be said to exist, has affirmatively authorized and approved that of which plaintiffs complain.

D. The absence of Tenoco (by change of name Utah Oil Refining Company, a Delaware corporation) as a party to this suit, such corporation being the purchaser and transferee of the assets of Utoco.

[fol. 87] E. The character of the right which plaintiffs seek to enforce is not joint, common or secondary.

6. Defendant moves to dismiss this suit, insofar as it may purport to be an action pursuant to Rule 23 (a) (3) of the Federal Rules of Civil Procedure, for the following reasons:

A. The persons similarly situated to plaintiffs are not so numerous as to make it impracticable to bring them all before the Court.

B. There is no common question of law or fact affecting the several rights of plaintiffs and of persons alleged to be similarly situated to plaintiffs.

C. The absence of Tenoco (by change of name Utah Oil Refining Company, a Delaware corporation) as a party to this suit, such corporation being the purchaser and transferee fo the assets of Utoco.

Wherefore, Standard Oil Foundation, Inc. prays judgment dismissing the Complaint.

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Weymouth Kirkland

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Howard Ellis

.....

John C. Butler

.....

Louis J. Keating

Kirkland, Fleming, Green, Martin & Ellis
—130 East Randolph Drive—RA 6-2929—
Attorneys for defendant, Standard Oil Foundation, Inc.

Thomas E. Sunderland
Richard J. Farrell
Of Counsel

[fol. 88]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

OTTO BEHIMER and JOHN A. ROBERTS,

Plaintiffs,

vs.

STANDARD OIL COMPANY, an Indiana corporation, and STANDARD OIL FOUNDATION, INC., an Indiana charitable corporation,

Defendants.

JOINT MOTION OF STANDARD OIL COMPANY AND STANDARD OIL FOUNDATION, INC., FOR TRANSFER OF THIS SUIT TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION—Filed March 11, 1958

Standard Oil Company and Standard Oil Foundation, Inc., defendants herein, by Weymouth Kirkland, Howard Ellis, John C. Butler and Louis J. Keating, move that this Court enter an order pursuant to Section 1404 (a) of the Judicial Code (28 USCA 1404 (a)) transferring this suit to the United States District Court for the District of Utah, Central Division.

As grounds for this motion, these defendants state:

1. This is a civil action brought by a resident of New York and a resident of Illinois complaining of the transfer and sale of assets by Utah Oil Refining Company, a corporation organized and existing under the laws of Utah (hereinafter called Utoco) to Ten West Broadway Oil Cor-
[fol. 89] poration, a corporation organized and existing under the laws of Delaware (hereinafter called Tenoco), in July of 1956, pursuant to the affirmative approval and authorization of the holders of more than 96.1% of the outstanding stock of Utoco.

2. Plaintiffs purport to bring this action "in a representative capacity on behalf of themselves and the other minority stockholders of Utoco who are or were similarly situated to Plaintiffs, as a representative suit." (Complaint, para. 6). Plaintiffs complain that Tenoco, alleged to be wholly owned and controlled by defendants, acquired all the assets (and assumed all the liabilities) of Utoco at a price which was "below the fair market value thereof" (Complaint, para. 9) and that this was accomplished because of the control and domination which defendants and others exercised over the officers and directors of Utoco.

3. Plaintiff Otto Behimer held 900 shares of Utoco stock, and plaintiff John A. Roberts held 1000 shares of such stock, at the time of the transfer, out of a total of 1,391,116 shares of Utoco stock then issued and outstanding. (Complaint, paras. 1, 4).

4. As appears from the Answer of the defendant Standard Oil Company:

A. On June 12, 1956, notice was given to the Utoco stockholders of a special stockholders' meeting, to be held on July 11, 1956 in Salt Lake City, Utah, to consider and vote for or against:

[fol. 90] (1) The approval of the agreement of June 11, 1956 between Utoco and Tenoco, and the confirmation and approval of the transfer and sale of the assets of Utoco to Tenoco, pursuant to the agreement;

(2) The change of name of Utoco to Lubra Oil Company or some other name dissimilar to "Utah Oil Refining Company"; and

(3) The liquidation and distribution of the assets of Utoco and the winding up and dissolution of Utoco.

A copy of the notice of the said special meeting, together with a proxy statement, was sent to all stockholders of record of Utoco at the close of business on June 12, 1956. Such notice and proxy statement are attached as Exhibit B to the Answer of defendant Standard Oil Company.

B. Although not required by the General Rules and Regulations of the Securities and Exchange Commission (since Utoco was not a company whose stock was listed on a national exchange), the proxy statement was prepared with respect to information required in a proxy statement used by a listed company.

C. Attached as Appendix 1 to the said proxy statement is a copy of the agreement of June 11, 1956 between Utoco and Tenoco (Plaintiff's Exhibit 1), which set forth the terms of the proposed transfer and sale of Utoco's assets to Tenoco. The terms of the said agreement and of the [fol. 91] transfer and sale, which were among the subjects noticed for consideration by, and approval or disapproval of, the Utoco stockholders at the special meeting called for July 11, 1956, are summarized on pages 2 and 3 of the proxy statement.

D. On July 11, 1956, defendant Standard Oil Company held 1,008,640 shares of Utoco's outstanding stock and defendant Standard Oil Foundation, Inc. held 71,380 such shares.

E. As one of the conditions to the fulfillment of the agreement, and to the transfer and sale of the assets of Utoco to Tenoco, it was provided in the agreement (paragraph 6 thereof) that the said transfer and sale must be approved by the aforesaid stockholders meeting by the affirmative vote of defendant Standard Oil Company and of the holders of more than 50% of the outstanding stock of Utoco other than that held by defendants Standard Oil Company and Standard Oil Foundation, Inc.

F. At the special meeting of the stockholders of Utoco, held on July 11, 1956 pursuant to the aforesaid notice, there were present, by person or by proxy, the holders of 1,352,608 shares of Utoco stock, out of a total outstanding 1,391,116 shares of such stock. The results of the stockholders' votes on the subjects noticed for the meeting were as follows:

[fol. 92]

Subject	Number of Shares For	Against
The approval of the agreement of June 11, 1956 between Utoco and Tenoco, and the confirmation and approval of the transfer and sale of the assets of Utoco to Tenoco	1,336,880	15,728
The change of name to Lubra Oil Company	1,336,880	15,728
The liquidation and distribution of the assets of Utoco and the winding up and dissolution of Utoco	1,336,880	15,728

Each of the three subjects was therefore approved by the affirmative vote of the holders of more than 96.1% of the outstanding stock of Utoco. The Utoco stockholders voting negatively on such subjects accounted for approximately 1.1%, and such stockholders who did not vote accounted for approximately 2.8%, of such outstanding stock.

G. Excluding the Utoco stock held by the defendants Standard Oil Company and Standard Oil Foundation, Inc., which was voted affirmatively on the above subjects, the Utoco stockholders' action thereon was:

Subject	Number of Shares For	Against	Not Present
The approval of the agreement of June 11, 1956 between Utoco and Tenoco, and the confirmation and approval of the transfer and sale of the assets of Utoco to Tenoco	256,860	15,728	38,508

[fol. 93]

The change of name to Lubra Oil Company	256,860	15,728	38,508
The liquidation and distribution of the assets of Utoco and the winding up and dissolution of Utoco	256,860	15,728	38,508

Each of the three subjects was therefore approved by the affirmative vote of approximately 82.57% of the outstanding stock of Utoco other than that held by defendants Standard Oil Company and Standard Oil Foundation, Inc. The Utoco stockholders voting negatively on such subjects accounted for approximately 5.05%, and such stockholders who did not vote accounted for approximately 12.38%, of such outstanding stock other than that held by defendants Standard Oil Company and Standard Oil Foundation, Inc.

H. In pursuance of the aforesaid stockholder authorization, the agreement between Utoco and Tenoco of June 11, 1956 was completed and Utoco transferred and sold its assets to Tenoco and received from Tenoco in consideration therefor 695,558 shares of the capital stock of defendant. Thereafter, by charter amendment, Tenoco changed its name to Utah Oil Refining Company and Utoco changed its name to Lubra Oil Company. On July 17, 1956 and again on July 25, 1956, the stockholders of Lubra Oil Company (Utoco) were notified by letter of its president of the action taken at the special meeting of July 11, 1956 and instructed as to the manner of exchanging their shares for [fol. 94] shares of the capital stock of defendant Standard Oil Company. Copies of these two letters are attached as Collective exhibit C to the Answer of defendant Standard Oil Company.

I. On August 9, 1956, Lubra Oil Company (Utoco) made application for dissolution to the District Court of the State of Utah, Third Judicial District, County of Salt Lake, which application was on that day ordered filed, and hearing thereon set for September 25, 1956. The former stockholders os Utoco were notified of this application for dissolution, both by published notice and by personal mail. On September 25, 1956, pursuant to the provisions of Title 78, Chapter 42 of the Utah Code Annotated, a decree of dissolution was entered by said Court (a copy of which decree is attached as Exhibit A to the Answer of defendant Standard Oil Company) without intervention or protest on the part of any stockholder.

J. As of a date shortly prior to the filing of the Answer by defendant Standard Oil Company, the holders of all but

9,674 shares of the former Utoco stock (or approximately 99.31%) had surrendered such stock and received defendant Standard Oil Company's stock in exchange therefor on the approval basis of two shares of the former for one of the latter. The tabulation of such exchange (excluding the two defendants therefrom) is as follows:

[fol. 95]

(1) Stockholders Who Voted Affirmatively	
a. Exchange effected	256,538
b. Exchange not yet effected (5 holders)	322
Total	256,860
(2) Stockholders Who Voted Negatively	
a. Exchange effected	7,354
b. Exchange not yet effected (17 holders)	8,374
Total	15,728
(3) Stockholders Not Present	
a. Exchange effected	37,530
b. Exchange not yet effected (5 holders)	978
Total	38,508

5. The stockholders on whose behalf plaintiffs purport to act are stated to be "themselves and the other minority stockholders of Utoco who are or were similarly situated to Plaintiffs" (Complaint, para. 6), being the holders of "170,577 shares of Utoco owned by others, includint the Plaintiffs herein, referred to herein as the Minority Stockholders." (Complaint, para. 5). As of July 11, 1956, such stockholders were 920 in number, and resided (according to Utoco's stock register) in thirty-five different states, districts and territories, as follows:

State, District or Territory	Number of Stockholders	Number of Shares
Utah	575	94,584
California	80	20,677
New York	79	27,628
Washington	37	2,738

[fol. 96]

Illinois	20	6,309
New Jersey	20	1,836

State, District or Territory	Number of Stockholders	Number of Shares
Idaho	17	1,531
Colorado	11	2,104
Nevada	11	2,546
Maryland	6	366
Maine	5	180
Missouri	5	418
Pennsylvania	5	389
Florida	4	285
Wisconsin	4	165
Hawaii	4	4,474
Connecticut	3	175
Massachusetts	3	310
Minnesota	3	196
Nebraska	3	507
Ohio	3	240
District of Columbia	3	535
Wyoming	3	1,064
Arizona	2	229
Kansas	2	150
Tennessee	2	29
Texas	2	93
Iowa	1	146
Kentucky	1	100
[fol. 97]		
Louisiana	1	300
Montana	1	20
North Carolina	1	30
Oklahoma	1	50
Oregon	1	150
Virginia	1	23
Totals	920	170,577

6. For the following reasons it is for the convenience of parties and witnesses and in the interest of justice that this suit be transferred to the United States District Court for the District of Utah, Central Division:

A. The majority of the class purported to be represented by plaintiffs in this suit, both in number of holders and in number of shares held, reside in Utah

or contiguous States. This is therefore good reason for holding the trial in their view and reach rather than in Chicago where they can learn of it only by report.

B. The evidence in this case will necessarily involve the testimony of witnesses who reside in Utah, including the allegedly "controlled" stockholders and allegedly "dominated" officers and directors of Utoco. The transfer of this suit to Salt Lake City will ease the problem of access to sources of proof, such as the availability and cost of process for the attendance of witnesses.

[fol. 98] C. The records of Utoco are kept in Utah, resort to which would be awkward and expensive in Chicago litigation.

D. The business of Tenoco (now by change of name Utah Oil Refining Corporation), the purchaser and transferee of Utoco's assets, would be disrupted by the absence of its officers and directors to attend to pre-trial and trial proceedings of this suit in Chicago.

E. The physical property transferred from Utoco to Tenoco is located in the States of Arizona, Colorado, Idaho, Nevada, Oregon, Utah, Washington and Wyoming. Any view thereof, if thought desirable, would be more easily and less expensively accomplished, if this suit were transferred to Salt Lake City.

F. Tenoco (by change of name Utah Oil Refining Corporation), the purchaser and transferee of the assets of Utoco for an amount claimed by the plaintiffs to be less than their fair market value, would appear to be a necessary party to this suit. It is subject to service of process in the District Court at Salt Lake City, but not in Chicago.

[fol. 99] G. The substantive law of Utah applies to the cause of action pleaded in this suit. There is the appropriateness in having the trial of this diversity case in a forum that is at home with the governing law of Utah, rather than having this court untangle problems in conflict of laws, and in a law foreign to itself.

H. The docket of this Court is one of the most congested in the country, whereas that of the transferee Court is relatively uncongested. It is a factor of public interest to avoid the administrative difficulties which follow when litigation is piled up in congested centers instead of being handled at its origin.

7. The defendants, by their attorneys, formally assure this Court that, in the event of the transfer of this suit as requested, their personal appearances will be entered in, and they will waive any legal privilege they may have as to the venue of, the United States District Court for the District of Utah, Central Division.

Wherefore, the defendants request leave to file affidavits and a brief in support of this motion within such time as may be fixed by this Court; and they further request that this motion be set down for oral argument on some date convenient to the Court after an opportunity has been [fol. 100] provided for the filing of affidavits and briefs in support of and in opposition to this motion.

.....

Weymouth Kirkland

.....

Howard Ellis

.....

John C. Butler

.....

Louis J. Keating

KIRKLAND, FLEMING, GREEN, MARTIN & ELLIS
130 East Randolph Drive
RAndolph 6-2929
Attorneys for defendants Standard Oil Company and Standard Oil Foundation, Inc.

Thomas E. Sunderland
Richard J. Farrell
of Counsel

[fol. 101]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CIVIL ACTION NO. 50 C 238

OTTO BEHIMER and JOHN A. ROBERTS,

Plaintiffs,

vs.

STANDARD OIL COMPANY, an Indiana corporation, and STANDARD OIL FOUNDATION, INC., an Indiana charitable corporation,

Defendants.

AFFIDAVIT OF GRANT A. BROWN IN SUPPORT OF THE JOINT MOTION OF STANDARD OIL COMPANY AND STANDARD OIL FOUNDATION, INC., FOR TRANSFER OF THIS SUIT TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION—Filed March 27, 1958

GRANT A. BROWN, being first duly sworn, on oath deposes and says:

1. I am fifty-one years of age and am General Counsel of Utah Oil Refining Company, a Delaware corporation (formerly known as Ten West Broadway Oil Corporation), herein sometimes called the Delaware company. I was appointed to this position on July 13, 1956. Prior to that time, I was General Counsel of Utah Oil Refining Company, a Utah corporation, herein sometimes called the [fol. 102] Utah company, acting in that capacity from November 1, 1954 to July 13, 1956, when the Utah company sold and transferred its assets to the Delaware company. I know either from my own personal knowledge or from persons working under my direction that all of the facts stated in this affidavit are true.

2. The captioned suit complains of the Utah company's sale and transfer of its assets to the Delaware company

pursuant to an alleged plan on the part of the two defendants, together with fifty-one other non-defendant persons and institutions (who among them held 1,220,539 shares out of a total of 1,391,116 issued and outstanding shares of the Utah Company), to utilize their majority control of that company so as to permit the two defendants to acquire such assets at a price below their fair market value.

3. The fifty-one stockholders of the Utah company, who allegedly permitted the two defendants to acquire such assets below their fair market value, are named in paragraph 5 of the complaint. According to the stock register of the Utah company, such persons and institutions are, with two exceptions, all residents of the State of Utah. A list of their names and addresses, together with their share holdings in the Utah company as of July 11, 1956, as taken from the said stock register, is attached hereto as APPENDIX A.

4. The two plaintiffs, according to the complaint "Bring [fol. 103] this action in a representative capacity on behalf of themselves and the other minority stockholders of (the Utah company) who are or were similarly situated to Plaintiffs, as a representative suit." (Complaint, para. 6). According to the stock register of the Utah company, as of July 11, 1956 these minority stockholders (defined in paragraph 5 in the complaint to be the holders of 170,577 shares of stock of the Utah company) were 920 in number and resided in thirty-five different States, districts and territories, as follows:

State, District or Territory	Number of Stockholders	Number of Shares
Utah	575	94,584
California	80	20,677
New York	79	27,628
Washington	37	2,738
Illinois	20	6,309
New Jersey	20	1,836
Idaho	17	1,531
Colorado	11	2,104
Nevada	11	2,546

State, District or Territory	Number of Stockholders	Number of Shares
Maryland	6	366
Maine	5	180
Missouri	5	418
Pennsylvania	5	389
[fol. 104]		
Florida	4	285
Wisconsin	4	165
Hawaii	4	4,474
Connecticut	3	175
Massachusetts	3	310
Minnesota	3	196
Nebraska	3	507
Ohio	3	240
District of Columbia	3	535
Wyoming	3	1,064
Arizona	2	229
Kansas	2	150
Tennessee	2	29
Texas	2	93
Iowa	1	146
Kentucky	1	100
Louisiana	1	300
Montana	1	20
North Carolina	1	30
Oklahoma	1	50
Oregon	1	150
Virginia	1	23
TOTALS	920	170,577

[fol. 105] 5. The complaint charges that the two defendants dominated and controlled the officers and directors of the Utah company. On July 11, 1956 (which was the date of the special meeting of the stockholders of the Utah company called to consider the sale and transfer of its assets), there were sixteen such officers and directors, all residents of Utah, their names, addresses and positions being as follows:

Name	Address	Office
A. J. Badger*	1533 Westmoreland Drive Salt Lake City, Utah	President and Director
F. R. Clark	1955 Herbert Avenue Salt Lake City, Utah	Vice President and Director
L. B. Taylor*	1863 East 9th South Salt Lake City, Utah	Vice President and Director
P. L. Vander Jagt*	4298 Holloway Drive Salt Lake City, Utah	Vice President and Director
H. M. George*	2533 Glenmare Street Salt Lake City, Utah	Treasurer
F. P. White*	1458 Bryan Avenue Salt Lake City, Utah	Assistant Treasurer
J. Floyd Stoker*	1746 Hollywood Avenue Salt Lake City, Utah	Secretary
M. L. Stayner*	1172 First Avenue Salt Lake City, Utah	Assistant Secretary
G. D. Earnshaw*	1636 Millbrook Road Salt Lake City, Utah	Comptroller
W. L. Olsen*	1875 Herbert Avenue Salt Lake City, Utah	Assistant Comptroller
[fol. 106]		
Wallace F. Bennett*	Box 1320 Salt Lake City 10, Utah	Director
Robert G. Clark*	939 Greenwood Terrace Salt Lake City, Utah	Director
W. H. Harris	c/o Utah Construction Co. First Security Bank Bldg. Ogden, Utah	Director
E. S. Holt*	1037 Douglas Street Salt Lake City, Utah	Director
Stephen L. Richards*	47 East South Temple Salt Lake City, Utah	Director
Henry A. Wallace	1155 Gilmer Drive Salt Lake City, Utah	Director

* Present incumbent of Utah Oil Refining Company (Delaware).

6. The offices of the Utah company were, and of the Delaware company are, located in the Utah Oil Building, in Salt Lake City, Utah. The books and records of the Utah company are stored in such offices, where they are kept in the custody of Messrs. J. Floyd Stoker and G. D. Earnshaw, presently Secretary and Comptroller of the Delaware company. Among such are included the following:

Articles of Incorporation and By-laws

Stock Register

Minute Books

Purchase Orders

[fol. 107]

Material Received Reports

Cancelled Checks

Check Registers

Vouchers

Payroll and Personnel Records

Books of Original Entry

Ledgers, in which are booked

(a) Operations

(b) Capital investments (property records)

(c) Personal Property records

Statements

(a) Operating

(b) Financial

Tax Records

Correspondence Files

7. The physical properties which were sold by the Utah company were located in the States of Arizona, Colorado, Idaho, Nevada, Oregon, Utah, Washington, and Wyoming. By far the greater amount of such physical properties was located in the States of Utah, Idaho, and Wyoming.

8. The Utah Company was licensed to do business and did business in the States of Arizona, Colorado, Idaho, Nevada, Oregon, Utah, Washington, and Wyoming. The Delaware company is licensed to do business and is doing [fol. 108] business in the States of Arizona, Idaho, Nevada, Oregon, Utah, and Washington; the Delaware corporation is licensed to do business but is not doing business in the States of Colorado and Wyoming. The Utah company was not, and the Delaware company is not, licensed to do or doing business in the State of Illinois.

9. Pursuant to notice given to the stockholders of the Utah company on June 12, 1956, a special meeting of such stockholders was held in Salt Lake City on July 11, 1956, at which time and place the holders of 1,336,880 shares of the Utah company stock (out of a total issued and outstanding 1,391,116 such shares) voted affirmatively, among other matters, upon (1) the sale and transfer of the assets of the Utah company to the Delaware company, and (2) the liquidation and distribution of the assets of the Utah company and the winding up and dissolution of the Utah company. Pursuant to such stockholder approval, the Utah company made application for dissolution, and was ordered dissolved, by decree of the District Court of Salt Lake, in conformity with Utah statutes, Title 78, Chapter 42, Utah Code Annotated 1953. The sale and transfer of its assets by the Utah company were effected pursuant to the powers specified by Title 16, Chapter 2, Section 15, Utah Code Annotated 1953.

[fol. 109] 10. The action taken by the Utah company, pursuant to such stockholder authorization, which is challenged by the instant suit, will of necessity concern itself with Utah law with which Utah courts, State and Federal, are naturally more intimately acquainted than courts outside the State of Utah.

11. The Annual Report of the Director of the Administrative Office of the United States Courts for 1957 states that there were pending in the Northern District of Illinois as of June 30, 1957, 2343 civil cases as compared to 112

civil cases in the District of Utah. (P. 172-173). During the fiscal year ended June 30, 1957, the median time interval from filing to disposition of civil cases in which a trial was held, according to this report, was 19.4 months in the Northern District of Illinois as compared with 8.5 months in the District of Utah. (P. 188-189). The number of private civil cases litigated in the Northern District of Illinois has marked that district as one of the busiest in the country, with one of the most congested dockets, and with a caseload per judgeship greatly in excess of the national average. (p. 119-120).

12. I am informed that the travel time and expense for a round trip between Salt Lake City and Chicago by available rail and air routes are as follows:

[fol. 110]

(a) Rail—38 hours 35 minutes to 51 hours 45 minutes	....	$170.87
(b) Air—11 hours 10 minutes to 13 hours 14 minutes	....	187.33

Grant A. Brown

STATE OF UTAH)
) SS.
COUNTY OF SALT LAKE)

Subscribed and sworn to before me this 25th day of March, 1958

Wayne C. Dunham
Notary Public, residing at
Salt Lake City, Utah
My commission
expires 7-31-61

[fol. 111]

APPENDIX "A" TO AFFIDAVIT OF GRANT A. BROWN

APPENDIX A

STOCKHOLDERS OF UTAH OIL REFINING COMPANY
AS OF JULY 11, 1956
AS NAMED IN PARAGRAPH FIVE
OF BEHIMER COMPLAINT

Name	Address	No. of Shares
The Bennett Association	61 West 1st South, Salt Lake City 1, Utah	30,000
David W. Bennett	c/o Wallace F. Bennett 65 West 1st South Salt Lake City, Utah	100
Frances G. Bennett	c/o Bennetts Post Office Box 1320 Salt Lake City, Utah	400
Harold H. Bennett	c/o Z.C.M.I. 15 South Main Salt Lake City, Utah	2,000
Richard S. Bennett	61 West 1st South Salt Lake City, Utah	3,500
Robert F. Bennett	c/o Wallace F. Bennett 65 West 1st South Salt Lake City, Utah	100
Rosetta W. Bennett	176 D Street Salt Lake City 3, Utah	200
Wallace F. Bennett	61 West 1st South Salt Lake City, Utah	2,000
Wallace G. Bennett	c/o Wallace F. Bennett 65 West 1st South Salt Lake City 1, Utah	150
J. D. Campbell	1647 South 15th East Salt Lake City 5, Utah	1,000
May N. Doscher	c/o Tracy Collins Trust Company 151 South Main Salt Lake City, Utah	475

[fol. 112]

Name	Address	No. of Shares
John L. Firmage	c/o Trust Department Walker Bank & Trust Company P. O. Box 1169 Salt Lake City 10, Utah	250
Rosemary B. Fletcher	56 Garden Avenue Chatham, New Jersey	100
Lois M. Greenwood	1590 Vine Street Salt Lake City, Utah	897
M. J. Greenwood	1590 Vine Street Salt Lake City, Utah	1,421
Mattie Wattis Harris	2584 Swaner Place Ogden, Utah	917
William H. Harris	c/o Utah Construction Company First Security Bank Building Ogden, Utah	10,000
Phyllis G. Harvey	2144 East 17th South Salt Lake City, Utah	930
Ruth Harris Hite	2584 Swaner Place Ogden, Utah	777
Edward S. Holt	1037 Douglas Street Salt Lake City, Utah	4,540
Reed E. Holt	Trust Department Walker Bank & Trust Company Salt Lake City, Utah	500
Frances B. Jeppson	c/o Bennetts P. O. Box 1320 Salt Lake City, Utah	100
Elise F. Musser	1133 Harvard Avenue Salt Lake City 5, Utah	1,407
Samuel C. Powell	614 Eccles Building Ogden, Utah	750
Mabel W. Reynolds	c/o Bennetts P. O. Box 1320 Salt Lake City, Utah	100
Stephen L. Richards	47 East South Temple Salt Lake City, Utah	584

[fol. 113]

Name	Address	No. of Shares
Catherine E. Sage	P. O. Box 675 Salt Lake City 9, Utah	4,450
Hilda Sandmann	64 South 9th East Salt Lake City, Utah	400
Aurelia H. Schettler, Trustee under Declaration of Trust dated June 24, 1955, with Catherine A. Lowe Hampton	510 M Street Salt Lake City, Utah	135
Dan B. Shields	419 Judge Building Salt Lake City 1, Utah	1,200
George Smith	821 Westminster Avenue Salt Lake City, Utah	400
Mary B. Smith	446 Douglas Street Salt Lake City 2, Utah	1,500
Genevieve Stafford	1952 Garfield Avenue Salt Lake City 5, Utah	1,892
Harold B. Stafford	1952 Garfield Avenue Salt Lake City 5, Utah	1,992
Tracy Collis Trust Company	151 South Main Street Salt Lake City, Utah	4,331
Tracy-Collins Trust Company, Guardian of the Estate of Sabina Degnan	151 South Main Street Salt Lake City, Utah	150
Tracy-Collins Trust Company, Guardian of the Estate of A. J. DuQuensue	151 South Main Street Salt Lake City, Utah	667
Walker Bank & Trust Company, Trustee under the Will of James J. Burke, Deceased	Salt Lake City, Utah	250
Walker Bank & Trust Company, Trustee under Deed of Trust dated November 1, 1948 with Charles B. Betty and Maggie C. Petty	Main at 2nd South Street Salt Lake City, Utah	100

[fol. 114]

Name	Address	No. of Shares
Walker Bank & Trust Company, Executor of the Estate of Margaret Burke Raleigh, deceased	Main at 2nd South Salt Lake City, Utah	549
Walker Bank & Trust Company, Executor of the Estate of Emma B. Selbach, deceased	2nd South and Main Streets Salt Lake City, Utah	800
Walker Bank & Trust Company, Trustee under Will of Ernest A. Tripp, deceased	Box 1169 Salt Lake City 10, Utah	425
A. C. Wallace	c/o John M. Wallace Walker Bank & Trust Company Salt Lake City, Utah	3,856
Henry A. Wallace, Jr.	1155 Gilmer Drive Salt Lake City 5, Utah	200
Ina Claire Wallace	Brocklebank Apartments 1000 Mason Street San Francisco 8, California	480
John M. Wallace	Trust Department Walker Bank & Trust Company Salt Lake City, Utah	45,814
John M. Wallace, Jr.	2520 Walker Land Salt Lake City 5, Utah	20
M. Elen Wallace	271 Second Avenue Salt Lake City 3, Utah	350
William R. Wallace, Sr.	64 South 9th East Salt Lake City 2, Utah	2,874
William R. Wallace, Jr.	Trust Department Walker Bank & Trust Company Salt Lake City, Utah	3,161
Elizabeth B. Winters	176 D Street Salt Lake City 3, Utah	1,325
	TOTAL	140,519

[fol. 128]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action No. 58 C 238

OTTO BEHIMER and JOHN A. ROBERTS,

Plaintiffs,

vs.

STANDARD OIL COMPANY, an Indiana corporation, and STANDARD OIL FOUNDATION, INC., an Indiana corporation.

Defendants.

AFFIDAVIT OF WARREN E. KING IN OPPOSITION OF JOINT MOTIONS OF DEFENDANTS FOR TRANSFER OF THIS CAUSE TO UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION—Filed April 24, 1958

Warren E. King, being first duly sworn upon his oath, deposes and says:

1. I am an attorney at law, duly licensed to practice before the United States District Court in which this cause is now pending. I am one of the attorneys for plaintiffs herein and I am in active charge of this cause. I am not licensed to practice law before the district courts of any other district.

2. The defendants herein are corporations organized and existing under the laws of the State of Indiana. Defendants have offices within the jurisdiction of, and are amenable to process of the United States District Court for the Northern District of Illinois.

3. Neither Standard Oil Company nor Standard Oil Foundation, Inc. are, or ever were, qualified to do business in the State of Utah, within the jurisdiction of the United States District Court for the District of Utah to the best

[fol. 129] of Affiant's knowledge, niether of the defendants maintains offices in, or has any property, or conducts any business within the jurisdiction of the United States District Court for the District of Utah. Affiant's Exhibit "A" is a copy of a letter received from the Secretary of State of Utah to the effect that neither defendant ever qualified to do business in that State.

4. Plaintiffs, at the present time, do not have any specific witnesses whose names they can present to the Court. The transaction complained of is that the defendants, by exercising control and dominance of UTOCO through their ownership of the majority of the stock of UTOCO, caused the assets of UTOCO to be sold to a wholly owned subsidiary of Standard Oil Company (TENOCO) for far less than the fair value of the UTOCO assets; that the assets of UTOCO were paid for by stock of Standard Oil Company, which stock, in turn, was distributed to the stockholders of UTOCO and UTOCO thereafter dissolved. The very nature of the transaction is one in which the negotiations, valuations, conversations and correspondence, through which the transaction was consummated, are primarily within the knowledge and possession of the defendants and their officers, directors and attorneys.

5. Plaintiffs have not caused an independent appraisal of the UTOCO properties as of the date of sale to be made. Such an appraisal would be inordinately expensive for plaintiffs. On the basis of the published statements of UTOCO it appears that during the operation of UTOCO, in order to depress the market price of UTOCO stock, the directors of UTOCO, acting under the domination of the defendants, failed to expand their operations, both in exploration and development of their oil and gas fields and [fol. 130] in the addition of retail outlets. UTOCO accumulated large amounts of liquid, but non-income producing, assets.

6. Plaintiffs anticipate that the facts adduced by discovery and deposition will disclose that the value of UTOCO stock was far in excess of the price paid for it by TENOCO, and paid for in stock of Standard Oil Company.

7. The price paid for UTOCO's assets, must, of necessity, have been determined by the executive of Standard Oil Company, possibly, and only possibly, after arms-length negotiation with UTOCO's officers and directors. The officers and directors of UTOCO held office only at the sufferance of the defendants. If they did not carry out Standard's bidding, they were subject to being removed at the expiration of their respective terms of office and more obedient directors elected by the defendants, the majority stockholders.

8. Regardless of the independence or subservience of UTOCO directors, an independent judgment must have been made by Standard's executives as to the value of UTOCO. Whether or not that judgment, and the price paid (in Standard stock) was fair to the minority stockholders of UTOCO is the basis of plaintiffs' suit. But, of necessity, Standard must have data, including description of UTOCO's properties and operations, appraisals, both of physical assets and of oil and gas reserves, upon which the judgment must have been based. Affiant believes that sufficient data, documents, appraisals, correspondence and other physical evidence exist in the offices of Standard Oil Company which, together with the depositions and evidence of Standard's officers and executives, living or working in or near Chicago, will be sufficient to prove plaintiffs' case.

[fol. 131] 9. Standard Oil Company has its principal office in Chicago, Illinois, within this judicial district. It occupies a twenty-story building at 910 S. Michigan Avenue, Chicago, Illinois, which is known as the Standard Oil Building. The administrative and executive offices are located there. Its legal department and law library occupy one floor of that building. Sullivan's Law Directory, 1957-58 Edition, page 380, lists over twenty-five attorneys as having their offices in that building, including the general counsel and associate counsel.

10. Affiant believes far more testimony will be given by executives of Standard Oil Company than will be given by executives of UTOCO. It will be far more convenient and less expensive for such of UTOCO's executives as may tes-

tify to come to Chicago than for those executives of Standard Oil who will testify to go to Utah.

11. Affiant believes that discovery and deposition will disclose the physical assets of UTOCO and the estimated reserves of oil and gas. Such data may become the subject of stipulation between the parties. It will then become necessary to obtain expert testimony as to the value of the physical assets, reserves, goodwill and going concern value of UTOCO. Plaintiffs anticipate obtaining such expert testimony from engineers, business analysts, professional appraisers and others, some of whom may be from the large universities located in Chicago.

12. Affiant is a Certified Public Accountant, holds a Master's degree in Business Administration from the Uni- [fol. 132] versity of Chicago and has been on the faculty of one of the larger institutions of higher learning in Chicago, lecturing on finance, investment and economics. Affiant intends to analyse the data disclosed by deposition and discovery and consult with the expert witnesses who will testify as to value. It would work an undue hardship on plaintiffs to require their counsel to travel to Utah and to pay the expense of the expert witnesses to travel to Utah if this case is transferred there.

13. Defendants' general counsel and a large staff of attorneys are located in Chicago. Standard Oil Company is a multi-million dollar concern and well able to afford any expense incidental to their transporting witnesses from Utah to Chicago. While it is not claimed that plaintiffs are impecunious, it is apparent that defendants are far better able to afford to bring their witnesses to Chicago than plaintiffs could afford to send their counsel and witnesses to Utah, or to retain additional counsel to represent them in that forum.

.....

Warren E. King

State of Illinois)
) ss.
County of Cook)

Subscribed and sworn to before
me this 23 day of April, 1958.

.....
Notary Public, residing at
Chicago, Illinois

My commission expires 7/18/59.

[fol. 168]

In the United States District Court
For the Northern District of Illinois
Eastern Division

Otto Behimer and John A. Roberts,

Plaintiffs,

vs.

Standard Oil Company, an Indiana corporation, and Standard Oil Foundation, Inc., an Indiana charitable corporation,

Defendants.

Order of Transfer—June 6, 1958

The defendants, Standard Oil Company and Standard Oil Foundation, Inc., having filed a joint motion to transfer this action to the United States District Court for the District of Utah, Central Division, sitting at Salt Lake City, Utah, pursuant to the provisions of Section 1404 (a) of the Judicial Code (28 USCA 1404 (a)); and

This Court, having considered the joint motion, briefs of counsel, and the affidavit of Grant A. Brown, Esq., in support of the joint motion, and the affidavit of Waren E. King, Esq., in opposition thereto, finds for the reasons stated in the joint motion of defendants that this action

should be transferred to said district for the convenience of the parties and witnesses and in the interest of justice.

[fol. 169] It Is Therefore Ordered that this action be and it is hereby forthwith transferred to the United States District Court for the District of Utah, Central Division, sitting at Salt Lake City, Utah.

It Is Further Ordered that the Clerk of this Court be and he is hereby instructed forthwith to transmit to the Clerk of the United States District Court for the District of Utah certified copies of all the papers filed with him in this proceeding, including a copy of his docket thereon and this Order of Transfer.

Enter .....
Chief Judge, United States District Court for the Northern District of Illinois.

Dated: June 6, 1958

[File endorsement omitted]

[fol. 170]

In United States Court of Appeals
For the Seventh Circuit

Before

Hon. F. Ryan Duffy, Chief Judge
Hon. .....
Hon. .....

No. 12356

[Title omitted]

Rule to Show Cause—June 30, 1958

It is alleged and not controverted in this record that petitioners were the owners respectively of 900 shares and 1000 shares of capital stock of Utah Oil Refining Company; that Standard Oil Company and Standard Oil Foundation, Inc., owned respectively 1,800,640 shares and 71,380 shares;

and that various individuals and trusts owned 140,519 shares of said stock of Utah Oil Refining Company.

Petitioners, as plaintiffs, brought an action in a representative capacity upon behalf of themselves and other minority stockholders, claiming violations of fiduciary relations by dominant and controlling officers and stockholders of respondents, in the sale of the assets of the Utah Oil Refining Company to a corporation owned and controlled by Standard Oil Company and Standard Oil Foundation, Inc.

[fol. 171] On February 12, 1958, petitioners, as plaintiffs, filed their complaint in the United States Court, Northern District of Illinois, Eastern Division. Defendants filed answer and motions to dismiss. On March 11, 1958, defendants filed a joint motion to transfer the suit to the United States District Court for the District of Utah, Central Division. Affidavits favoring and opposing said motion were filed. On June 6, 1958, without hearing oral arguments and without filing a written opinion, an order was entered by the Honorable Philip L. Sullivan transferring the cause to the United States District Court for the District of Utah, Central Division.

Claiming said order of transfer was not for the convenience of the parties or witnesses, and that said suit could not have been brought in the United States District Court for the District of Utah, Central Division, the plaintiffs, in said suit as petitioners herein, filed a petition for a writ of mandamus.

It Is Ordered, a rule issue requiring the Honorable Philip L. Sullivan, United States District Judge, Northern District of Illinois, Eastern Division, to show cause why a writ of mandamus should not issue as demanded in said petition; that said writ be returnable to this Court within thirty (30) days from the date of this order.

[fol. 172] [File endorsement omitted]

[fol. 173]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[Title omitted]

ANSWER OF RESPONDENT TO PETITION FOR WRIT OF MANDAMUS —Filed July 25, 1958

Pursuant to the Rule To Show Cause of this Court issued June 30, 1958, I hereby respectfully submit my answer to the petition of Otto Behimer and John A. Roberts for a writ of mandamus. Petitioners, one of whom is a resident of Illinois and the other of New York, complain of my order transferring to the Federal Court in Salt Lake City a class action which they had filed in the Northern District of Illinois. Petitioners' case, brought by them in a representative capacity, involves the propriety under Utah law [fol. 174] of the sale in 1956 by a Utah corporation of its assets. These assets were located in Utah and seven other far Western States. The class for whom petitioners assume to act consists of 920 stockholders of this Utah corporation, of which number 575 reside in Utah and 134 in California, Washington and Idaho.

1. Petitioners state that defendants, Standard Oil Company, an Indiana corporation (Standard) and Standard Oil Foundation, Inc., an Indiana charitable corporation (Foundation), were majority stockholders of Utah Oil Refining Company, a Utah corporation (Utoco). Petitioners charge that Standard and the Foundation, together with fifty-two other stockholders of Utoco, acted in derogation of the rights of the remaining stockholders by using their majority control to permit a subsidiary of the defendants to acquire 100% control of the assets of Utoco at a price below the fair market value thereof. The pleadings show that a proposal for this sale had been submitted to all the stockholders of Utoco, to be voted on at a special meeting

to be held in Salt Lake City on July 11, 1956. The proposal stated that the sale would not take place unless it were approved both by the affirmative vote of Standard and of the holders of more than 50% of the outstanding stock of Utoco other than Standard and the Foundation. The pro- [fol. 175] posal contemplated that, upon such approval, Utoco would sell its assets to Standard's subsidiary, would receive in exchange therefor Standard stock to be distributed to Utoco stockholders on a one for two basis, and would then dissolve. At this stockholders' meeting of July 11, 1956, approval was given to this proposal not only by Standard and the Foundation (who between them held 77.6% of the Utoco stock), but as well by the affirmative vote of the holders of 82.5% of all other outstanding stock, excluding that held by Standard and the Foundation. This latter figure would include not only the 140,519 shares held by the fifty-two stockholders whom petitioners call "Controlled Stockholders" in their complaint, but additionally the holders of 116,341 shares (out of a total of 170,577 shares) who are allegedly members of the class for whom petitioners assume to act, and whom they call the "Minority Stockholders." In other words, over 68% of the stock held by such Minority Stockholders was voted to approve that which petitioners seek to condemn on their behalf.

2. Petitioners' action was filed on February 12, 1958 in the United States District Court for the Northern District of Illinois, Eastern Division, and was numbered 58 C 238. Petitioners did not charge defendants with misrepresentation or concealment; their case, which is to be measured by [fol. 176] the yardstick of Utah law since this is a diversity case, charges that the defendants and the Controlled Stockholders improperly used their majority control in approving the sale at a price which was inadequate, and that the defendants dominated the officers and directors of Utoco in this regard. On March 10, 1958, each of the defendants filed its answer denying their alleged control over the fifty-two stockholders and their alleged dominance of the Utoco officers and directors. As part of their answer, defendants also moved to dismiss petitioners' complaint insofar as it purported to allege a class action.

3. On March 11, 1958, the defendants brought on before me their joint motion to transfer the action to the United States District Court for the District of Utah, Central Division. At this time, I approved the procedure which counsel for the parties had worked out between themselves, and accordingly accepted their time table for the filing of their briefs and affidavits upon the completion of which, petitioners not asking for oral argument and defendants having waived such, the motion was to be taken under advisement. A copy of my order of March 11, 1958, since it is not included in petitioners' record, is attached to my answer and marked Respondent's Exhibit 1. Defendants filed the affidavit of one Grant A. Brown, an attorney in Salt Lake City, Utah, who had been General Counsel for Utoco, and [fol. 177] petitioners filed in answer the affidavit of their attorney, Warren E. King, which did not in any way controvert the statements in the Brown affidavit.

4. By inspection of the Brown affidavit, it became apparent that the class of Minority Stockholders, of whom petitioners allege themselves to be the representatives, consists of 918 persons (in addition to petitioners) of whom 575 reside in Utah and 134 more live in California, Washington and Idaho. These 709 persons hold 119,530 shares of stock, or approximately 70% of the total of all shares held by the class, which is 170,577 shares.

5. Because of the responsibility with which any District Court is faced when an alleged class action is brought before it, not only to adjudicate as between the parties but as well to safeguard the interests of all the members of the class, the factor of their residence was one which greatly impressed me. My feeling of responsibility was heightened by the complete omission on the part of petitioners to allege that they had been authorized to bring suit or to make any showing that they would fairly insure the adequate representation of all. In consequence, I felt the remark of the Supreme Court to be particularly apt that "In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn

of it by report only." *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. at p. 509.

[fol. 178] 6. For reasons which I mention shortly, I came to the conclusion that, if I had the power to do so, I would be guilty of an abuse of the discretion vested in me by Section 1404(a) of the Judicial Code if I refused to transfer this action to Salt Lake City. But I was at first bothered by the circumstance that I might lack the power to transfer because the United States District Court for the District of Utah, Central Division, was not one where initially this case "might have been brought." I had noted the defendants' assurance in their joint transfer motion that "in the event of the transfer of this suit as requested, their personal appearance will be entered in, and they will waive any legal privilege they may have as to the venue of," the transferee court. I had appreciated the fact that the Court of Appeals for the First, Second, Third and Fifth Circuits* had ruled that District Courts had such power under such an assurance. The action of this Court, however, in *General Casualty Company* v. *Grubb*, on March 5, 1958, reported in 253 F. 2d 51, removed all doubt on this score, and my power to transfer being affirmed as a legal proposition, I regarded my duty to transfer under the facts of the instant case as [fol. 179] obvious. I might add that subsequent to the date of my transfer order of June 6, 1958, this Court has reaffirmed its decision in Judge Grubb's case by its opinion in the petition of John F. Blaski involving Judge Hoffman (No. 12285 in this Court, decided July 1, 1958), and the Supreme Court has denied certiorari in Judge Grubb's case on June 9, 1958. *General Casualty Company* v. *Grubb*, 356 U.S. ——.

7. I assume therefore that this Court, in issuing its Rule to Show Cause, was not concerned with the fact of my

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* That is, *in re Josephson*, 218 F.2d 174 (First Circuit); *Anthony* v. *Kaufman*, 193 F.2d 85 (Second Circuit); *Paramount Pictures* v. *Rodney*, 186 F.2d 111 (Third Circuit); and *Ex parte Blaski*, 245 F.2d 737 (Fifth Circuit).

power to transfer. Likewise, I assume that petitioners' charge of prematurity does not much trouble the Court. Petitioners state that I should not have acted on the transfer motion before the defendants' motions to dismiss had been disposed of, on the ground that if the motions are well founded in law there would be no justiciable controversy left. But petitioners seem to overlook the fact, which I cannot overlook, that defendants' motions to dismiss are not addressed to the suit in its entirety but only to its class action aspect. Therefore, even if I had considered and upheld these motions, petitioners' own case would remain, which the motions did not challenge. There would still be this controversy left, and had I thrown out the entire case, I would have been subject to reversal under the ruling of this Court in *Weeks* v. *Bareco Oil Co.*, 125 F.2d 84, at p. 93. Additionally and apart from this, I be-[fol. 180] lieve the forum best suited to consider defendants' attack upon the adequacy of petitioners' representation of the alleged class would be the forum at Salt Lake City, Utah, in which State the majority of the class reside, and to whose judge the members could much more readily make known their views. That Court should be allowed the freedom of ruling on that aspect of the case, unhindered by any action in this regard by the transferring court.

8. If petitioners' attack on my power to transfer and the prematurity of my order be regarded as having no merit, then only petitioners' third and last assertion is left: viz., that I was guilty of an abuse of discretion in ordering the transfer of the action. It is my firm conviction, however, that I would have abused my discretion if I had not ordered the transfer, for I felt, in view of the reasons advanced in defendants' transfer motion, that this action should be transferred as requested. I so announced this to counsel from the bench, and I made this finding in my order of transfer. In view of this, and because the facts so plainly warranted the transfer, I did not think a written opinion to be necessary.

9. In sum, the reasons on which I felt a transfer was compelled were:

[fol. 181] A. The majority of the class for whom petitioners assume to act reside in Utah or contiguous States. In my mind, this circumstance outweighed petitioners' choice of forum. The original forum (Chicago, Illinois), considered both in relation to the residence of the two petitioners (Illinois and New York) and the residence of the majority of the class, seemed, in the words of the Supreme Court in the *Koster* case, much less appropriate than the transferee forum in "relation to the whole group of members and stockholders whom plaintiff volunteers to represent." 330 U.S. at p. 526.

B. Petitioners have asserted in their complaint, and defendants have denied, that a group of stockholders (not members of the alleged class), some fifty-two in number, were controlled by the defendants. Likewise placed in issue by the pleadings is the question whether the officers and directors of the corporation, sixteen in number, were dominated by defendants. All of such stockholders (with two exceptions) and all of these officers and directors (one is now dead) live in Utah. Defendants stated that the testimony of these persons will be necessarily involved. I think they are right because I find it to be inconceivable, in view of the issues as to dominance and control, that petitioners [fol. 182] will not have to call at least some of these persons as witnesses in order to sustain their burden of proof arising from these controverted issues. The residence of these witnesses in Utah would, of course, make the Federal Court at Salt Lake City much the more convenient forum, particularly considering their amenability to subpoena in Utah. Each of their names and addresses appear in the affidavit supporting defendants' transfer motion.

C. The Brown affidavit submitted by defendants describes in some detail the books and records of Utoco, all of which are located in Salt Lake City in the custody of one Stoker and one Earnshaw, two officers of the purchasing corporation. These books and records, including such items as operating and financial statements and ledgers

showing capital investments and property accounts, would be better examined and utilized in the Utah forum where witnesses could be subpoenaed to testify about them and where their inspection could be coordinated with a concurrent view of the premises, should the District Judge in Utah deem this advisable.

D. The corporate assets themselves, which petitioners claim were sold for an inadequate price, are located in the eight Western States of Arizona, Colorado, Idaho, Nevada, Oregon, Utah, Washington and Wyoming. I believe, in the context of the issues of this case, that the court trying [fol. 183] this case might regard a view of the premises to be proper. If this be so, certainly Chicago, as opposed to Salt Lake City, would be inconvenient.

E. The purchasing corporation has its offices in Salt Lake City. It would be amenable to suit, and could readily be made an additional party defendant to the instant action were such to be transferred to Salt Lake City. Some members of petitioners' alleged class might well prefer that this be done.

F. The business of the purchasing corporation would be disrupted by the absence of its officers and directors to attend pre-trial and trial proceedings of this suit in Chicago.

G. In this diversity case, the substantive law by which the rights and obligations of the parties are to be governed is that of Utah. Transfer there would eliminate problems of conflict of laws and facilitate the disposition of the case by a court more at home with Utah law than the court in Chicago.

H. Petitioners have not disputed the circumstance that the calendar of the Northern District of Illinois is much more congested than that of the District of Utah. Petitioners would be able to secure trial much more rapidly there, and in a forum which has a much closer relation to the litigation than Chicago.

[fol. 184] For the above reasons, I found that the action should be transferred to the United States District Court

for the District of Utah, Central Division, for the convenience of the parties and witnesses and in the interest of justice. Indeed, under the circumstances, I believe I could not properly have refused such transfer.

Dated, Chicago, Illinois, this 21st day of July, 1958.

Respectfully submitted,

Philip L. Sullivan, Chief Judge of the United States District Court for the Northern District of Illinois, Respondent.

[fol. 185]

RESPONDENT'S EXHIBIT 1 TO ANSWER

UNITED STATES DISTRICT COURT
Office of the Clerk
United States Court House
Chicago 4

DATE: Mar. 14, 1958

Re: Otto Behimer, et al.

Vs. Standard Oil Co., et al.

Case No. 58 C 238

You are hereby notified that Judge Sullivan entered the following order of March 11, 1958:

Defts. given until Mar. 27, 1958 to file affidavits and brief in support of their joint motion to transfer case to Salt Lake City. Pltffs. given until April 11, 1958 to file their brief and Defts. given until April 21, 1958 to file their Reply brief and said motion is taken under advisement.

ROY H. JOHNSON, Clerk

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[fol. 186]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 12356 SEPTEMBER TERM, 1958 SEPTEMBER SESSION, 1958.

OTTO BEHIMER and JOHN A. ROBERTS, Petitioners,

v.

HONORABLE PHILIP L. SULLIVAN, Chief Judge of the United States District Court for the Northern District of Illinois, Respondent.

Petition for Writ of Mandamus

Before DUFFY, *Chief Judge*, and MAJOR and SCHNACKENBERG, *Circuit Judges*.

OPINION—November 26, 1958

SCHNACKENBERG, *Circuit Judge*. Petitioners for a writ of mandamus, Otto Behimer and John A. Roberts, citizens of Illinois and New York, respectively, filed their complaint for damages in the District Court for the Northern District of Illinois, Eastern Division, against Standard Oil Company and Standard Oil Foundation, Inc., Indiana corporations, on behalf of themselves and other minority stockholders of Utah Oil Refining Co. (herein referred to as UTOCO), a Utah corporation.

The allegations of the complaint, in substance, are that defendants owned a large majority of the stock of UTOCO, [fol. 187] approximately 77.6% of the total of 1,391,116 shares of the outstanding stock; that plaintiffs owned 1,900 shares; that 140,519 shares were owned by (to use petitioners' words) "controlled stockholders"; that the officers and directors of UTOCO were under the control and domination of defendants; that, pursuant to an agreement between defendants and UTOCO, a Delaware corporation, wholly owned by Standard Oil Company, was formed; that the only asset of the Delaware corporation was stock of

Standard Oil Company; that the Delaware corporation purchased all of the assets of UTOCO and paid therefor with Standard Oil stock so that the only asset of UTOCO became the Standard Oil stock; that this stock, in turn, was distributed to UTOCO stockholders at the rate of one share of Standard for each two shares of UTOCO; and that, after the distribution, UTOCO caused itself to be dissolved.

The complaint further alleges that the "oppressive action" of defendants and the "controlled stockholders" resulted in defendants' acquiring 100% of UTOCO at a price far below the fair value thereof; that UTOCO stockholders were compelled to become stockholders of Standard Oil Company, and that UTOCO stockholders suffered monetary damages to the extent of the difference between the market value of one-half share of Standard Oil stock and the fair value of one share of their UTOCO stock.

Defendants filed their respective answers and motions to dismiss the complaint, and the following day, before any disposition was made of the motions to dismiss, filed their joint motion to transfer the cause to the United States District Court for the District of Utah. Pursuant to order of court, defendants filed their affidavit and brief in support of their motion, petitioners filed their affidavit and brief in opposition thereto, and defendants filed a reply brief.

The district court granted the motion for transfer.

Petitioners, in their affidavit and brief before the district court, allege (without denial by defendants) that statutory venue does not exist in the United States District Court for the District of Utah, neither defendant does business [fol 188] there, resides there, or is amenable to service of process there.[1]

Petitioners contend in this court, *inter alia*, that respondent lacked power to transfer the action to the District of

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[1] Defendants have not challenged the statutory venue, 28 U.S.C.A. § 1391(a), of the District Court for the Northern District of Illinois, Eastern Division. Cf. *Olberding* v. *Illinois Central R. Co.*, 346 U.S. 338, 340.

Utah. In their petition in this court they say that they could not have brought their suit in the District of Utah.

Respondent's answer to the petition for a writ of mandamus sets forth in detail the facts in the case which he believes justified his order of transfer. He asserts that he assumed "that this court, in issuing its Rule to Show Cause, was not concerned with the fact of my power to transfer."

In his brief, respondent asserts that he did have power to make the transfer pursuant to 28 U.S.C.A. § 1404 (a). He states that, in their joint motion to transfer, defendants formally assured the court that their personal appearances would be entered in, and they would waive any legal privilege they might have as to the venue of, the United States District Court for the District of Utah, Central Division.

On the facts before us in this record, we are required to decide whether respondent had power to make the transfer. We hold that he did not have that power. Whether or not he properly exercised his discretion in the mistaken belief that he did have such power, it will be unnecessary for us to decide.

The controlling language is contained in 28 U.S.C.A. § 1404 (a):

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

When Congress provided for the transfer of a case to a district "where it might have been brought," it meant the district where plaintiff had a recognized right to bring [fol. 189] his case under the Venue Act[2] and that this right was unqualified and absolute, not depending upon consent of the defendant, evidenced by waiver, entry of appearance, or otherwise. If when a suit is commenced, plaintiff has a right to sue in that district, independently of the wishes of defendant, it is a district "where it might have been brought." If he does not have that right, independently of the wishes of defendant, it is not a district "where it might

[2] 28 U.S.C.A. § 1391.

have been brought," and it is immaterial that the defendant subsequently acquiesces. The test is, did the plaintiff have an independent right to commence suit in the district to which it is sought to make transfer? If so, it is a district "where it might have been brought"; otherwise, it is not such a district. We recognize, of course, that venue may be waived under proper circumstances, but we do not think it can be waived in a forum in which an action has not and could not have been properly brought by the opposing party. To hold otherwise is to permit a defendant to select a forum not available to a plaintiff as a matter of right, and over plaintiff's objection. *Blaski* v. *Hoffman, Judge*, No. 12285 in this court, October 16, 1958, ... F. 2d .....

A writ of mandamus will issue directed to respondent, commanding him to vacate the order entered by him in case numbered 58 C 238, entitled *Otto Behimer and John A. Roberts, plaintiffs*, v. *Standard Oil Company, and Standard Oil Foundation, Inc., Indiana corporations, defendants*, which order transferred said case to the United States District Court for the District of Utah, Central Division, and further commanding respondent to proceed to adjudicate and determine said case according to law.

ORDER MANDAMUS ISSUE.

[fol. 190]

IN UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 12356

OTTO BEHIMER and JOHN A. ROBERTS, Petitioners,

vs.

HONORABLE PHILIP L. SULLIVAN, Chief Judge of the United States District Court for the Northern District of Illinois, Respondent.

Original Petition for Writ of Mandamus

This matter comes before the Court on the petition of Otto Behimer and John A. Roberts for a writ of mandamus, the response of respondent thereto, filed pursuant to a Rule

To Show Cause heretofore issued by this Court, and was argued by counsel.

JUDGMENT—November 26, 1958

On consideration whereof, it is ordered and adjudged by this Court that a writ of mandamus issue directed to respondent, commanding him to vacate the order entered by him in case numbered 58 C 238, entitled *Otto Behimer and John A. Roberts, plaintiffs*, v. *Standard Oil Company, and Standard Oil Foundation, Inc., Indiana corporations, defendants*, which order transferred said case to the United States District Court for the District of Utah, Central Division, and further commanding respondent to proceed to adjudicate and determine said case according to law, in accordance with the opinion of this Court filed this day.

[fol. 191]

IN UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Before Hon. Elmer J. Schnackenberg, Circuit Judge.

[Title omitted]

STAY ORDER—December 8, 1958

On consideration of the petition of counsel for respondent,

It Is Ordered that the issuance of the writ of mandamus as ordered in the above entitled cause on November 26, 1958 be stayed for thirty (30) days, and if within such thirty (30) days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court certifying that certiorari petition, record and brief have been filed, the stay shall continue until final disposition by the Supreme Court.

[fol. 192] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 193]

SUPREME COURT OF THE UNITED STATES

No. 26, October Term, 1959

SULLIVAN, Chief Judge of the United States District Court for the Northern District of Illinois, Petitioner,

vs.

OTTO BEHIMER et al.

ORDER ALLOWING CERTIORARI—October 12, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted. The case is transferred to the summary calendar and set for argument immediately following No. 25.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office-Supreme Court, U.S.
FILED
DEC 31 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. [redacted] 26

Honorable PHILIP L. SULLIVAN, Chief Judge of the United States District Court for the Northern District of Illinois,
Petitioner,

v.

OTTO BEHIMER and JOHN A. ROBERTS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No.

Honorable PHILIP L. SULLIVAN, Chief Judge of the United States District Court for the Northern District of Illinois,
Petitioner,

v.

OTTO BEHIMER and JOHN A. ROBERTS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Philip L. Sullivan, Chief Judge of the United States District Court for the Northern District of Illinois, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on November 26, 1958. That judgment directed the issuance of a writ of mandamus to command petitioner to vacate an order of transfer entered by him pursuant to 28 U.S.C. § 1404(a).

OPINIONS BELOW.

No opinion was delivered in the District Court. The opinion of the Court of Appeals, set forth in the Appendix at App. 1, has not yet been reported.

JURISDICTION.

The judgment of the Court of Appeals is dated November 26, 1958. This Court has jurisdiction to review that judgment by certiorari under 28 U.S.C. § 1254(1).

QUESTION PRESENTED.

Whether 28 U.S.C. § 1404(a) permits a District Court to transfer a civil action for the convenience of parties and witnesses and in the interest of justice to a district wherein venue and personal jurisdiction are obtained by reason of defendant's waiver and consent?

The judgment of the Court of Appeals herein is in direct conflict with decisions of other Courts of Appeals in the First, Second, Third, and Fifth Circuits, as outlined below. The question has not been passed on by this Court.

STATUTE INVOLVED.

Title 28 U.S.C. § 1404(a). *Change of venue*:

> "(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

STATEMENT OF THE CASE.

On June 6, 1958, petitioner ordered that a minority stockholders' suit, which concerned the sale of assets by a Utah corporation, be transferred to the District of Utah. This sale of assets, which had taken place in Salt Lake City pursuant to the statutes of Utah, was attacked in Chicago by two stockholders of the Utah corporation, who complained of the allegedly inadequate price paid for the assets of that company. The two plaintiffs volunteered their action on behalf of 920 stockholders, the majority of whom reside in Utah. The purchasing company, which had succeeded to the seller's business conducted in Utah and other Western States, was not made a party to plaintiffs' suit. Petitioner based his order upon his finding that the transfer of the action was for the convenience of the parties and witnesses and in the interest of justice.

On November 26, 1958, the Court of Appeals, deeming it unnecessary to decide whether petitioner had properly exercised his discretion, directed that a writ of mandamus issue commanding petitioner to vacate his order of transfer solely because, in the Court of Appeals' view, petitioner, as District Judge, lacked the statutory authority to send the case to the District of Utah. This petition seeks a review of that decision.

The underlying suit which petitioner had ordered be transferred to Utah is *Behimer* v. *Standard Oil Company*, Civil Action 58 C 238. This case is a diversity action by two dissident minority stockholders of Utah Oil Refining Company ("UTOCO"). Plaintiffs seek damages from the majority stockholder, Standard Oil Company, an Indiana corporation ("Standard"), for allegedly using its majority control to cause UTOCO, a Utah corporation, to sell its assets at a price claimed to be below their fair market value. Standard, together with Standard Oil Foundation,

Inc., an Indiana charitable corporation ("Foundation"), owned 77.6% of the outstanding stock of UTOCO. Pursuant to a plan of reorganization, a proposal was made to the UTOCO stockholders that a newly organized wholly owned Standard subsidiary purchase UTOCO's assets, paying therefore 695,558 shares of Standard stock and additionally assuming UTOCO's liabilities.[1] The Standard stock was then to be distributed by UTOCO to its stockholders on a 1 for 2 basis.

This proposal was overwhelmingly approved at a special meeting of stockholders held in Salt Lake City, Utah on July 11, 1956, with over 96% of the stock voting in favor (over 82% of the non-Standard stock) and only 1% (5% of the non-Standard stock) opposed. The sale was accordingly consummated later in the month of July, 1956. In September, 1956, upon notice to all stockholders and without intervention or protest by them, a decree of dissolution of the Utah corporation was entered by the District Court of the State of Utah, Third Judicial District, County of Salt Lake.

On February 13, 1958, the two plaintiffs, respondents here, filed suit against Standard and Foundation in the United States District Court for the Northern District of Illinois. Jurisdiction was based upon diversity of citizenship (28 U.S.C. § 1332, prior to its recent amendment), the two plaintiffs being, respectively, citizens and residents of Illinois and New York. Plaintiffs proffered their action "on behalf of themselves and the other minority stockholders of UTOCO who are or were similarly situated to

[1] This proposal had been approved by UTOCO's directors, who submitted it in full detail to the stockholders upon the express understanding that the sale would not take place unless it met with the affirmative vote of Standard and the holders of more than 50% of the outstanding stock of UTOCO other than that held by Standard and Foundation.

plaintiffs, as a representative suit." As noted above, the class whom plaintiffs seek to represent in the Northern District of Illinois were for the most part residents of the State of Utah.[2]

Denying any wrongful conduct, defendants answered plaintiffs' charges, moved to dismiss the class action aspect of the case on the ground, among others, of plaintiffs' inadequate representation, and moved to transfer the cause to the District of Utah where the majority of plaintiffs' alleged class resided.[3]

The transaction about which plaintiffs complain grew out of matters that had occurred in Utah. The parties' rights are governed by Utah law. A majority of the alleged class reside in Utah. Plaintiffs might have brought their suit in Utah either as a derivative action under 28 U.S.C. §§ 1401 and 1695, or as a class action against the purchasing corporation. Nevertheless, plaintiffs chose to file their suit in Chicago and opposed defendants' transfer motion on the ground that neither defendant was a resident, doing business, or amenable to process in Utah. Defendants' motion, however, had met that circumstance with this recital:

[2] Of the 920 UTOCO stockholders, 575 reside in Utah; 173 more reside in other Intermountain or Pacific Coast States. These 748 stockholders account, in number of shares, for over 73% of the shares of stock held by all members of the purported class (125,643 shares out of 170,577), in contrast to the 1900 shares owned by the two plaintiffs.

[3] Petitioner did not act on the motions to dismiss, stating in his answer in response to the Rule to Show Cause in the Court of Appeals: "I believe the forum best suited to consider defendants' attack upon the adequacy of [the plaintiffs'] representation of the alleged class would be the forum of Salt Lake City, Utah, in which State the majority of the class reside, and to whose judge the members could much more readily make known their views."

> "The defendants, by their attorneys, formally assure this Court that, in the event of the transfer of this suit as requested, their personal appearances will be entered in, and they will waive any legal privilege they may have as to the venue of, the United States District Court for the District of Utah, Central Division."

Petitioner, acting in reliance upon *General Casualty Co.* v. *Grubb*, 253 F.2d 51 (7th Cir. 1958) (discussed hereafter) as to his power to transfer, and upon *Gulf Oil Corporation* v. *Gilbert*, 330 U.S. 501 (1947) as to the indicia by which his discretion to exercise such power should be guided,[4] granted the transfer motion.[5] Plaintiffs thereupon sought to prevent this transfer by a writ of mandamus from the Seventh Circuit.

Meanwhile, the Seventh Circuit had under consideration another petition to review a § 1404(a) transfer decision by writ of mandamus. The circumstances of that

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[4] Petitioner considered eight reasons which he felt compelled the transfer: the Utah residence of a majority of the class, the presence in Utah of all the UTOCO directors and all but two of fifty-one allegedly "controlled" stockholders, the Utah situs of the books and records of UTOCO, the location of UTOCO's assets (whose value was in question) in Utah and other western states, the amenability to suit in Utah of the purchasing corporation, the disruption of the business of UTOCO's successor if its officers and directors were to attend to a Chicago trial, the Utah Court's familiarity with Utah law by which this case is to be governed, and the heavier congestion of the calendar of petitioner's court.

[5] The transfer of this case from Chicago to Utah will place the controversy in a forum readily accessible to a majority of the alleged class. That will encourage greater class participation in this litigation and effect a corresponding reduction in possible future suits involving the same subject matter. Spurious class actions, such as the present suit is believed to be, are only binding upon those members of the alleged class who appear and participate in the litigation. 3 Moore Federal Practice (2nd Ed. 1948) ¶ 23.11, at 3472.

case, *Blaski* v. *Hoffman*, had already been before the Fifth Circuit, which held that § 1404(a) empowered a Texas District Judge to transfer the action to the Northern District of Illinois wherein venue and service of process were based solely on waiver and consent. *Ex Parte Blaski*, 245 F.2d 737 (5th Cir. 1957), *cert. denied*, 355 U.S. 872 (1957). When Judge Hoffman in Chicago refused plaintiffs' request to send that case back to Texas, plaintiffs sought mandamus to compel the re-transfer. The Seventh Circuit at first unanimously denied the writ on the authority of its own decision in *General Casualty Co.* v. *Grubb*, 253 F.2d 51 (7th Cir. 1958), *cert. denied*, 357 U.S. 907 (1958) (not reported; herein App. 8). On rehearing, however, the Seventh Circuit granted a writ of mandamus on October 16, 1958. *Blaski* v. *Hoffman*, 260 F.2d 317 (7th Cir. 1958) (herein App. 10). Because of this intra-circuit conflict with *General Casualty Co.* v. *Grubb*, *supra*, Respondent Judge Hoffman moved for a rehearing *en banc*, and petitioner in this case filed a supporting brief *amicus curiae*. Rehearing was denied. A petition for certiorari to review that decision has already been filed in this Court. *Hoffman* v. *Blaski*, No. 597, October Term, 1958.

One day after the *en banc* rehearing was denied in *Blaski* v. *Hoffman* the panel hearing the instant case awarded a writ of mandamus commanding petitioner to vacate his order of transfer. In an opinion that sketches the facts and incorporates language from *Blaski* v. *Hoffman*, opinion, the Court held that 28 U.S.C. § 1404(a) conferred no authority to transfer to a District where venue and service of process were dependent upon waiver and consent in defendant's motion to transfer. *Behimer* v. *Sullivan*, ... F.2d .... (7th Cir. 1958) (herein App. 1).

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I.

The Seventh Circuit decision in this case, (and in *Blaski* v. *Hoffman*, No. 597, October Term, 1958), is in direct conflict with the decisions of other Courts of Appeals on the same matter:

1. **Fifth Circuit.** *Ex Parte Blaski*, 245 F.2d 737 (1957), *cert. denied*, 355 U.S. 872 (1957).
2. **First Circuit.** *In Re Josephson*, 218 F.2d 174 (1954).
3. **Second Circuit.** *Anthony* v. *Kaufman*, 193 F.2d 85 (1951), *cert. denied*, 342 U.S. 955 (1952);
   Torres v. *Walsh*, 221 F.2d 319 (1955), *cert. denied*, 350 U.S. 836 (1955).
4. **Third Circuit.** *Paramount Pictures* v. *Rodney*, 186 F.2d 111 (1950), *cert. denied*, 340 U.S. 953 (1951).

II.

The Seventh Circuit's decision in this case (and in *Blaski* v. *Hoffman*) is the subject of a direct intra-circuit conflict with another Seventh Circuit case involving a different panel of judges: *General Casualty Co.* v. *Grubb*, 253 F. 2d 51 (7th Cir. 1958), *cert. denied*, 357 U.S. 907 (1958).

III.

This case involves an important question of federal law which has not been but should be settled by this Court.

ARGUMENT.

I.

Conflict With Other Circuits.

By the Seventh Circuit's own admission[6] its decision in the *Blaski* case, and by the same token in this case, is directly contrary to that of the Fifth Circuit in *Ex Parte Blaski, supra.* While suggesting "some points of distinction"[7] from the other cases cited above, the Court conceded that "all these cases contain language which in one way or another supports the power of the Texas Court in the instant matter."[8]

In *Paramount Pictures* v. *Rodney, supra,* the Third Circuit held that § 1404(a) gave a District Court authority to transfer to Texas a civil antitrust action against fourteen defendants, including five as to whom venue could not originally have been laid in that jurisdiction. Likewise, in *Anthony* v. *Kaufman, supra,* the Second Circuit approved the transfer of a case to a district where one of the two defendants could not have been served and where, as to it, venue was improper. In *In Re Josephson, supra,* the First Circuit also rejected a want of authority argument in approving an order transferring to New Mexico a derivative action by a New York stockholder against a New Mexico Corporation and three citizens of Massachusetts who were not subject to service of process in New Mexico. In each case defendants waived any objections to venue and agreed to enter their appearances in the transferee court.

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[6] Opinion, App. 17-18.

[7] Opinion, App. 18.

[8] Ibid.

The Seventh Circuit suggested that these cases might be distinguished on the ground that in each one of them the action might in the first instance have been brought in the transferee district against one or more (though not all) defendants. But it is submitted that Chief Judge Biggs, Chief Judge Magruder and Judge Frank would not, and in fact did not, rest the transfer law of their respective circuits on so precarious a subtlety.

The *Rodney* ruling was placed squarely upon the circumstance that "defendants have waived any objection to Texas venue and have agreed to submit themselves to a Texas court."[9] In *Anthony* v. *Kaufman*, *supra*, Judge Frank put it this way:

> "But here, one defendant could have been served in the transferee district, while the other defendant, which could not there have been served, has joined in the application for, and thus consented to, the transfer. That consent is a waiver of lack of venue; had such a waiver existed before plaintiff commenced suit, it could have been brought there. We think 28 U.S.C. § 1404 (a) covers such a case."[10]

In the *Josephson* case the Court held that the transferee venue was proper since the corporation could have sued the other defendants in that forum. 28 U.S.C. § 1401. The stockholder argued in that case that the action was not one that "might have been brought" in the District of New Mexico since the Massachusetts defendants were not subject to service of process in that jurisdiction. Terming such a supposed requirement a "gloss upon § 1404(a)," Chief Judge Magruder wrote:

> "Even in the Second Circuit, which seems to have originated this gloss upon § 1404(a), it now appears to be recognized that transfer to a district in which

[9] 186 F. 2d, at 114.

[10] 193 F. 2d, at 86.

the defendants would not have been originally amenable to process would be all right if the defendants consent to the transfer. See *Ford Motor Co.* v. *Ryan*, 2 Cir., 1950, 182 F. 2d 329, certiorari denied, 1950, 340 U.S. 851, 71 S. Ct. 79, 95 L. Ed. 624; *Anthony* v. *Kaufman*, 2 Cir., 1951, 193 F. 2d 85, certiorari denied, 1952, 342 U.S. 955, 72 S. Ct. 629, 96 L. Ed. 710; *Welch* v. *Esso Shipping Co.*, D.C.S.D.N.Y. 1953, 112 F. Supp. 611; *Mire* v. *Esso Shipping Co.*, D.C.S.D. N.Y. 1953, 112 F. Supp. 612. That qualification was fully satisfied in the case at bar, since not only have the defendants been served with process in Massachusetts but they have all formally agreed to enter their appearance in the federal court of the transferee district and to waive any question of venue or of the personal jurisdiction of the transferee court over them." [11]

As the opinions adequately demonstrate, the foregoing cases did not rest on the technicality suggested by the Seventh Circuit. Nor could they have done so, for the "distinction" is without legal significance. If consent and waiver will not cure the transferee court's absence of personal jurisdiction and venue over certain defendants, it is difficult to see how that defect is cured by the fact that some other defendants are amenable to service and venue. By transferring the action against all defendants rather than merely that against defendants who might in the first instance have been sued in the transferee forum, the cited cases held that the action "might have been brought" against all within the meaning of 28 U.S.C. § 1404(a).[12]

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[11] 218 F. 2d, at 185.

[12] Compare *Shapiro* v. *Bonanza Hotel Co.*, 185 F. 2d 777 (9th Cir. 1950), and *Foster-Milburn Co.* v. *Knight*, 181 F. 2d 949 (2nd Cir. 1950), where District Courts were held without authority under § 1404(a) to transfer cases to districts where the defendants were not subject to service of process. The proposed transfers there, however, were at the instance of the *plaintiff*, and defendants had not given their consent.

The Second Circuit's decision in *Torres* v. *Walsh*, *supra*, cannot be brushed aside merely by characterizing it as a proceeding in admiralty. That action, which began with the libel of a vessel in the Southern District of New York, was transferred to the District of Puerto Rico. Since the vessel located in New York could not have been libelled by a federal court in Puerto Rico, the legal issue with respect to the language of § 1404(a) was identical with that in the instant case. The Second Circuit sustained the transfer power, holding that because respondent had filed the appropriate bond and had undertaken to appear in the Puerto Rican action, the District Court of that jurisdiction was "in effect a court where the action might have been brought.[13]

Finally, the Fifth Circuit's *Ex Parte Blaski*, *supra*, is clearly in direct conflict with the decision below. There the Court remarked:

> "The rule which to us seems the better reasoned and which has been adopted by the majority of the courts, permits the transfer upon the motion or with the consent of the defendants even though they could not have been served with the process of the transferee court."[14]

The foregoing sufficiently demonstrates that the decision below is in direct conflict with the decisions of four other Courts of Appeals.[15]

[13] 221 F. 2d, at 321.

[14] 245 F. 2d, at 738.

[15] Notwithstanding the fact that the predecessor of 28 U.S.C. § 1391(a) directed that diversity cases "*shall* be brought *only* in the district of the residence of either the plaintiff or the defendant" (emphasis added), such actions "might [have been] brought" in other districts and prosecuted to judgment absent a seasonable assertion by the defendant of his venue privilege. *Commercial Ins. Co.* v. *Stone Co.*, 278 U.S. 177 (1929).

II.

Intra-Circuit Conflict.

The Seventh Circuit's decision in the instant case is the subject of an intra-circuit conflict with *General Casualty Co.* v. *Grubb, supra,* a case involving a different panel of judges. There the Court approved a § 1404(a) transfer to the Northern District of Oklahoma of a declaratory judgment action involving the interpretation of an insurance policy brought by the insurer, a Washington corporation, against two citizens and residents of Wisconsin. While the Court speaks in terms of discretion rather than authority, the following passage from the opinion in that case demonstrates that the statutory question involved here was resolved there:

> "By their motion to transfer defendants have agreed to become amenable to process in Oklahoma, and we cannot say Judge Grubb abused his discretion by viewing their consent as squaring with the phrase 'where it might have been brought' found in § 1404. See *Ex Parte Blaski*, 5 Cir., 1957, 245 F. 2d 737."[16]

Petitioner, as *amicus curiae,* supported the *Blaski* v. *Hoffman* attempt to have the Seventh Circuit sit *en banc* to resolve this intra-circuit conflict. Compare *Robinson* v. *Johnston,* 316 U.S. 649 (1942). The Court (with two judges dissenting) declined to do so, and since the legal question in the instant case is identical with that in *Blaski* v. *Hoffman,* petitioner felt it would be presumptive to renew the *en banc* motion in this case. From all appearances the conflict can only be resolved by this Court.

[16] 253 F. 2d, at 53.

III.

Importance of Question.

This case involves an important question which has not been but should be resolved by this Court. Section 1404(a) was meant to reduce the cost and improve the quality of judicial administration. The volume of interpretive litigation suggests that it has fallen short its goal. Section 1404(a) has in fact introduced new elements of uncertainty and complexity. As the decisions in the footnote reveal, litigation over the question presented in this case has more than contributed its share to the complexities, the uncertainties, the delays, and the expense.[17]

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[17] *General Casualty Co.* v. *Keller*, 154 F. Supp. 451 (E.D. Wis. 1957), mandamus refused, *General Casualty Co.* v. *Grubb*, 253 F. 2d 51 (7th Cir. 1958), *cer. denied*, 357 U.S. 907 (1958); *Ex Parte Blaski*, 245 F. 2d 737 (5th Cir. 1957), *cert. denied*, 355 U.S. 872 (1957); *Hill* v. *Upper Miss. Towing Corp.*, 141 F. Supp. 692 (D. Minn. 1956); *Torres* v. *Walsh*, 221 F. 2d 319 (2d Cir. 1955), *cert. denied*, 350 U.S. 836 (1955); *General Electric Co.* v. *Central Transit Whse. Co.*, 127 F. Supp. 817 (W.D. Mo. 1955); *Felchlin* v. *American Smelting & Rfg. Co.*, 136 F. Supp. 577 (S.D. Calif. 1955); *In Re Josephson*, 218 F. 2d 174 (1st Cir. 1954); *Cain* v. *Bowater's Newfoundland Pulp and Paper Mills*, 127 F. Supp. 949 (E.D. Penna. 1954); *Sheridan* v. *Pan-American Rfg. Corp.*, 123 F. Supp. 81 (S.D.N.Y. 1954); *Welch* v. *Esso Shipping Co.*, 112 F. Supp. 611 (S.D.N.Y. 1953); *Mire* v. *Esso Shipping Co.*, 112 F. Supp. 612 (S.D.N.Y. 1953); *Johnson* v. *Harris*, 112 F. Supp. 338 (E.D. Tenn. 1953); *United States* v. *Reid*, 104 F. Supp. 260 (E.D. Ark. 1952); *Anthony* v. *Kaufman*, 193 F. 2d 85 (2d Cir. 1951), *cert. denied*, 342 U.S. 955 (1952); *Wilson* v. *Kansas City So. Ry. Co.*, 101 F. Supp. 56 (W.D. Mo. 1951); *Tivoli Realty Inc.* v. *Paramount Pictures*, 89 F. Supp. 278 (D. Del. 1950), mandamus granted, *Paramount Pictures* v. *Rodney*, 186 F. 2d 111 (3d Cir. 1950), *cert. denied*, 340 U.S. 953 (1951); *United States* v. 11 *Cases, etc.*, 94 F. Supp. 925 (D. Ore. 1950); *Ferguson* v. *Ford Motor Co.*, 89 F. Supp. 45 (S.D.N.Y. 1950), mandamus denied, *Ford Motor Co.* v. *Ryan*, 182 F. 2d 329 (2d Cir. 1950), *cert. denied*, 340 U.S. 851 (1950); *Hamilton Theatres* v. *Paramount Film Dist. Corp.*, 90 F. Supp. 645 (D.D.C. 1950).

CONCLUSION.

The conflict the Seventh Circuit has created on this question is sure to prolong the controversy until it is resolved by this Court. Your petitioner is interested in this matter from his desire to see a most important and controverted question authoritatively settled, and for that reason respectfully submits that a writ of certiorari should be granted in this case.

Respectfully submitted,

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APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 12356 SEPTEMBER TERM, 1958 SEPTEMBER SESSION, 1958.

OTTO BEHIMER and JOHN A. ROBERTS,
Petitioners,

v.

Honorable PHILIP L. SULLIVAN, Chief Judge of the United States District Court for the Northern District of Illinois,
Respondent.

Petition for Writ of Mandamus

November 26, 1958

Before DUFFY, *Chief Judge*, and MAJOR and SCHNACKENBERG, *Circuit Judges*.

SCHNACKENBERG, *Circuit Judge*. Petitioners for a writ of mandamus, Otto Behimer and John A. Roberts, citizens of Illinois and New York, respectively, filed their complaint for damages in the District Court for the Northern District of Illinois, Eastern Division, against Standard Oil Company and Standard Oil Foundation, Inc., Indiana corporations, on behalf of themselves and other minority

stockholders of Utah Oil Refining Co. (herein referred to as UTOCO), a Utah corporation.

The allegations of the complaint, in substance, are that defendants owned a large majority of the stock of UTOCO, approximately 77.6% of the total of 1,391,116 shares of the outstanding stock; that plaintiffs owned 1,900 shares; that 140,519 shares were owned by (to use petitioners' words) "controlled stockholders"; that the officers and directors of UTOCO were under the control and domination of defendants; that, pursuant to an agreement between defendants and UTOCO, a Delaware corporation, wholly owned by Standard Oil Company, was formed; that the only asset of the Delaware corporation was stock of Standard Oil Company; that the Delaware corporation purchased all of the assets of UTOCO and paid therefor with Standard Oil stock so that the only asset of UTOCO became the Standard Oil stock; that this stock, in turn, was distributed to UTOCO stockholders at the rate of one share of Standard for each two shares of UTOCO; and that, after the distribution, UTOCO caused itself to be dissolved.

The complaint further alleges that the "oppressive action" of defendants and the "controlled stockholders" resulted in defendants' acquiring 100% of UTOCO at a price far below the fair value thereof; that UTOCO stockholders were compelled to become stockholders of Standard Oil Company, and that UTOCO stockholders suffered monetary damages to the extent of the difference between the market value of one-half share of Standard Oil stock and the fair value of one share of their UTOCO stock.

Defendants filed their respective answers and motions to dismiss the complaint, and the following day, before any disposition was made of the motions to dismiss, filed their joint motion to transfer the cause to the United

States District Court for the District of Utah. Pursuant to order of court, defendants filed their affidavit and brief in support of their motion, petitioners filed their affidavit and brief in opposition thereto, and defendants filed a reply brief.

The district court granted the motion for transfer.

Petitioners, in their affidavit and brief before the district court, allege (without denial by defendants) that statutory venue does not exist in the United States District Court for the District of Utah, neither defendant does business there, resides there, or is amenable to service of process there.[1]

Petitioners contend in this court, *inter alia*, that respondent lacked power to transfer the action to the District of Utah. In their petition in this court they say that they could not have brought their suit in the District of Utah.

Respondent's answer to the petition for a writ of mandamus sets forth in detail the facts in the case which he believes justified his order of transfer. He asserts that he assumed "that this court, in issuing its Rule to Show Cause, was not concerned with the fact of my power to transfer."

In his brief, respondent asserts that he did have power to make the transfer pursuant to 28 U.S.C.A. § 1404(a). He states that, in their joint motion to transfer, defendants formally assured the court that their personal appearances would be entered in, and they would waive any legal privilege they might have as to the venue of, the United States District Court for the District of Utah, Central Division.

[1] Defendants have not challenged the statutory venue, 28 U.S.C.A. § 1391 (a), of the District Court for the Northern District of Illinois, Eastern Division. *Cf. Olberding* v. *Illinois Central R. Co.*, 346 U.S. 338, 340.

On the facts before us in this record, we are required to decide whether respondent had power to make the transfer. We hold that he did not have that power. Whether or not he properly exercised his discretion in the mistaken belief that he did have such power, it will be unnecessary for us to decide.

The controlling language is contained in 28 U.S.C.A. § 1404(a):

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

When Congress provided for the transfer of a case to a district "where it might have been brought," it meant the district where plaintiff had a recognized right to bring his case under the Venue Act[2] and that this right was unqualified and absolute, not depending upon consent of the defendant, evidenced by waiver, entry of appearance, or otherwise. If when a suit is commenced, plaintiff has a right to sue in that district, independently of the wishes of defendant, it is a district "where it might have been brought." If he does not have that right, independently of the wishes of defendant, it is not a district "where it might have been brought," and it is immaterial that the defendant subsequently acquiesces. The test is, did the plaintiff have an independent right to commence suit in the district to which it is sought to make transfer? If so, it is a district "where it might have been brought"; otherwise, it is not such a district. We recognize, of course, that venue may be waived under proper circumstances, but we do not think it can be waived in a forum in which an action has not and could not have been properly brought by the opposing party. To

[2] 28 U.S.C.A. § 1391.

hold otherwise is to permit a defendant to select a forum not available to a plaintiff as a matter of right, and over plaintiff's objection. *Blaski* v. *Hoffman, Judge,* No. 12285 in this court, October 16, 1958, ... F. 2d .....

A writ of mandamus will issue directed to respondent, commanding him to vacate the order entered by him in case numbered 58 C 238, entitled *Otto Behimer and John A. Roberts, plaintiffs,* v. *Standard Oil Company, and Standard Oil Foundation, Inc., Indiana corporations, defendants,* which order transferred said case to the United States District Court for the District of Utah, Central Division, and further commanding respondent to proceed to adjudicate and determine said case according to law.

ORDER MANDAMUS ISSUE.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 12356 Wednesday, November 26, 1958

BEFORE

Hon. F. RYAN DUFFY, *Chief Judge*
Hon. J. EARL MAJOR, *Circuit Judge*
Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*

OTTO BEHIMER and JOHN A. ROBERTS, *Petitioners*,

v.

HONORABLE PHILIP L. SULLIVAN, Chief Judge of the United States District Court for the Northern District of Illinois, *Respondent*.

Original Petition for Writ of Mandamus.

This matter comes before the Court on the petition of Otto Behimer and John A. Roberts for a writ of mandamus, the response of respondent thereto, filed pursuant to a Rule To Show Cause heretofore issued by this Court, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that a writ of mandamus issue directed to respondent, commanding him to vacate the order entered

by him in case numbered 58 C 238, entitled *Otto Behimer and John A. Roberts, plaintiffs,* v. *Standard Oil Company, and Standard Oil Foundation, Inc., Indiana corporations, defendants,* which order transferred said case to the United States District Court for the District of Utah, Central Division, and further commanding respondent to proceed to adjudicate and determine said case according to law, in accordance with the opinion of this Court filed this day.

A True Copy:
Teste:

Kenneth J. Carrick
Clerk of the United States Court of Appeals for the Seventh Circuit.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 12285. SEPTEMBER TERM, 1957, APRIL SESSION, 1958.

JOHN F. BLASKI, et al.,
Petitioners,

v.

HONORABLE JULIUS J. HOFFMAN,
United States District Judge,
Respondent.

} Original Petition for Writ of Mandamus.

July 1, 1958.

Before MAJOR, FINNEGAN and SCHNACKENBERG, *Circuit Judges.*

FINNEGAN, *Circuit Judge.* *Ex Parte Blaski*, 245 F. 2d 737 (5th Cir. 1957) is the opinion of the Fifth Circuit denying Blaski, et al., leave to file a petition for a writ of mandamus as a device for vacating an order of transfer from the Northern District of Texas to the Northern District of Illinois. After this case arrived in the United States District Court, Chicago, Illinois, the Texas plaintiffs (petitioners in our court) invoking 28 U.S.C. § 1404(a), asked the respondent district judge to transfer the cause back to Texas. He denied plaintiffs' motion and this mandamus petition followed. The *Blaski* opinion, just cited, adequately states the facts and petitioners' arguments in our court

add nothing substantial — legally or factually. There appears to be no legalistic reason just why the respondent district judge should overrule the Fifth Circuit and we think petitioners fail in making any showing that judicial discretion has been abused. *General Casualty Company of America* v. *Grubb*, ... F. 2d .... (7th Cir. 1958).

The petition for writ of mandamus is

DENIED.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 12285 — SEPTEMBER TERM AND SESSION, 1958

JOHN F. BLASKI et al.,
Petitioners,

v.

HONORABLE JULIUS J. HOFFMAN,
United States District Judge,
Respondent.

Petition for Writ of Mandamus on Petition for Rehearing.

October 16, 1958

Before MAJOR, FINNEGAN and SCHNACKENBERG, *Circuit Judges.*

MAJOR, *Circuit Judge.* This Court, on July 1, 1958, rendered an opinion denying petitioners' petition for a writ of mandamus. Upon petition for rehearing, it is ordered that such opinion be withdrawn and that all orders entered pursuant thereto be vacated and set aside.

The facts which give rise to the legal issue for decision are not in dispute. Petitioners, as plaintiffs, on March 1, 1957 filed in the United States District Court, Northern District of Texas, Dallas Division (hereinafter referred to as the Texas Court or District), a complaint charging R. P. Howell, Jr. and Lifetime Metal Building Company

with patent infringement. Plaintiffs reside or are doing business within the Northern District of Illinois (hereinafter referred to as the Illinois District). The complaint alleged acts of infringement committed by defendants in the Texas District, and no acts of infringement, so far as known, committed by either of the defendants in the Illinois District. Service of process was had upon defendants in the Texas District. Defendants answered the complaint and the case was set for trial.

In the meantime, defendants submitted a motion requesting transfer of the action to the Illinois District, under Title 28 U.S.C.A. Sec. 1404(a), stating in their motion that defendants waived lack of venue in the Illinois District. Over objection of plaintiffs (petitioners here), the Texas Court directed that, for the convenience of the parties and witnesses and in the interest of justice, the action be transferred to the Illinois District.

Plaintiffs, after denial of their motion to vacate the order of transfer, filed a petition for writ of mandamus in the United States Court of Appeals for the Fifth Circuit, requesting that Court to issue an order to show cause why a writ of mandamus should not be issued against the Texas District Judge, nullifying the transfer order. The Court of Appeals (5 Cir.) held that the District Court was empowered by statute to make the transfer, and denied leave to file the petition. *Ex Parte Blaski et al.*, 245 F. 2d 737.

The papers and records in the Texas District infringement action were received in the Clerk's Office of the Illinois District pursuant to the transfer order. Thereupon, petitioners filed a motion in the Illinois District for an order directing the transfer of and remandment of the action to the Texas District, on the ground that the Texas Court was without power to order the transfer

and, consequently, the Illinois Court did not acquire jurisdiction. A hearing on the petition and response thereto was had before Honorable Julius J. Hoffman, a Judge of the Illinois District and respondent in the instant proceeding. Respondent, on March 14, 1958, entered an order denying petitioners' motion, and in an oral opinion stated his reasons therefor. Thereupon, petitioners filed in this Court the petition now before us for a writ of mandamus directing respondent to order such transfer and remand.

No question is raised, in fact all parties concede that under Sec. 1651 (a), Title 28 U.S.C.A., mandamus is an appropriate means for testing the legality of the order in controversy. Furthermore, our jurisdiction, if there be any doubt, is supported by the decision of this Court in *Chicago, R.I. & P.R. Co.* v. *Igoe*, 212 F. 2d 378.

The questions for decision appear to be correctly stated in petitioners' brief, and are as follows:

> "(1) Whether a district court, having proper venue and jurisdiction over defendants in a patent infringement action, has the power under Section 1404 (a), Title 28, U.S.C.A. to transfer the cause of action, on motion of the defendants and over the objections of the plaintiffs, to a district in which venue is not proper; and
>
> "(2) Whether, under such circumstances, the transferee court acquires jurisdiction, or has the power to accept such a transfer."

Two statutory provisions are pertinent: Secs. 1400 (b) and 1404 (a), Title 28 U.S.C.A. Section 1400 (b), a venue provision, specifically applicable to actions for patent infringement, provides:

> "Any civil action for patent infringement *may be brought* in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business. [Italics supplied.]"

Section 1404 (a), relating to change of venue, provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division *where it might have been brought.* [Italics supplied.]"

It is not open to doubt but that petitioners' action was properly brought in the Texas District, where defendants not only resided but where the acts of infringement took place and where defendants had their regular and established place of business. It appears plain, also, that venue could not properly have been laid in the Illinois District. A solution of the problem before us reduces itself to the legal effect to be given the concluding phrase of Sec. 1404 (a), "where it might have been brought." Does that phrase refer to the district where such an action "may be brought" under Sec. 1400 (b)? If the question was of first impression, we would have no hesitancy in answering in the affirmative. It is a contradiction of terms and does violence to the plan, unambiguous language which Congress has employed, to reason that the Texas Court, with power to transfer the action only to a district "where it might have been brought," could exercise that power by ordering transfer to a district which it could not have been brought.

If the Texas District had the power on motion of defendants to transfer the action to the Illinois District, it likewise had the power on a similar motion to transfer it to any District Court in the United States. Counsel for respondent argues that the Illinois District was one where the action "might have been brought" because it had general jurisdiction of an action for patent infringement and acquired jurisdiction of defendants by their motion to transfer and their consent to trial in the Illinois District. Precisely the same argument could be made in support of the power of the Texas District if transfer had been made to any other District Court in the United

States. Counsel's argument, if accepted, renders the phrase "where it might have been brought" meaningless. The transfer provision would be complete absent the phrase of limitation. This phrase, however, cannot be ignored under the guise of statutory construction; to do so amounts to statutory emasculation.

It must be clearly kept in mind that there is no issue of discretion involved in the instant matter either on the part of the Texas District Judge in ordering the transfer or on the part of the respondent in refusing to remand it. The sole issue is that of power on the part of one to transfer, on the part of the other to accept and entertain jurisdiction. Also, the general rule should not be overlooked that a Federal Court has only such jurisdiction or power as Congress has specifically conferred. The venue where a patent infringement action may be brought, as well as the district to which it may be subsequently transferred, has been clearly delineated by Congress.

When Congress provided for transfer to a district "where it might have been brought," it is hardly open to doubt but that it referred to a district where the plaintiff, in a case sought to be transferred, had a right to bring the case. Under the decisions of the Supreme Court and other courts, the action could have been properly brought only in the district (1) where defendant resides or (2) where defendant has committed acts of infringement and has a regular and established place of business. Under the admitted facts, the action could have been properly brought only in the Texas District. Conversely, it could not have been properly brought in the Illinois District.

In *Stonite Products Co.* v. *Melvin Lloyd Co. et al.*, 315 U.S. 561, the question for determination was whether Sec. 48 of the Judicial Code (Title 28 U.S.C.A. Sec. 109) was the sole provision governing venue of patent litigation. Referring to that section, the Court stated (page 562):

> "Section 48 gives jurisdiction of suits for patents infringement to the United States district courts in the district of which the defendant is an inhabitant, or in any district in which the defendant shall have committed acts of infrigement and have a regular and established place of business."

On the following page the Court stated:

> "We hold that Section 48 is the exclusive provision controlling venue in patent infringement proceedings."

Section 48, before the Court in Stonite, was the predecessor venue provision to Sec. 1400 (b) of the present Code. The holding in *Stonite*, however, is equally applicable to the present venue provision. *Fourco Glass Co.* v. *Transmirra Products Corp. et al.*, 353 U.S. 222. The Court in the latter case stated (page 228):

> "For it will be seen that Section 1400 (b) is equally clear and, also, that it deals specially and specifically with venue in patent infringement actions."

And again, on the following page:

> "We hold that 28 U.S.C. Sec. 1400 (b) is the sole and exclusive provision controlling venue in patent infringement actions * * *."

See also the recent opinion by Judge Mercer in *Gas Products Corp.* v. *George D. Roper Corp. et al.*, 147 F. Supp. 853.

When Congress provided for the transfer of a case to a district "where it might have been brought," it meant the district where plaintiff has a recognized right to bring his case under the Venue Act and that this right was unqualified and absolute, not depending upon consent of the defendant, evidenced by waiver, entry of appearance, or otherwise. If when a suit is commenced, plaintiff has a right to sue in that district, independently of the wishes of defendant, it is a district "where it might have been brought." If he does not have that right, independently of the wishes of defendant, it is not a district "where it

might have been brought," and it is immaterial that the defendant subsequently acquiesces. The test is, did the plaintiff have an independent right to commence suit in the district to which it is sought to make transfer? If so, it is a district "where it might have been brought"; otherwise, it is not such a district. We recognize, of course, that venue may be waived under proper circumstances, but we do not think it can be waived in a forum in which an action has not and could not have been properly brought by the opposing party. To hold otherwise is to permit a defendant to select a forum not available to a plaintiff as a matter of right, and over plaintiff's objection.

Respondent in his brief states:

> "Petitioners fail to recognize the difference between jurisdiction of the subject matter and venue over the particular defendants. The District Court had jurisdiction of the subject matter at the time the original suit was brought by reason of the very nature of the suit, *i.e.*, patent infringement."

True, every District Court has jurisdiction over patent infringement litigation generally but the suggestion must be novel, certainly not sound, that the Illinois Court acquired jurisdiction of the subject matter of the instant action at the time it was brought in the Texas District. No court, so far as we are aware, in an action for patent infringement or any other, acquires jurisdiction either of the subject matter or of the parties until the action is properly brought in such court. Furthermore, it begs the question to suggest that the Illinois Court acquired jurisdiction via the transfer because that is dependent upon the issue for decision, that is, whether Congress has endowed the transferring court with power to order the transfer. As shown, the action could not properly have been brought in the Illinois Court, and, therefore, it was not a district "where it might have been brought." Con-

sequently, the Texas Court was without power to order the transfer and the Illinois Court acquired neither jurisdiction nor venue of the action.

Our conclusion is based upon what we think is a clear congressional mandate. In *Ex Parte Collett*, 337 U.S. 55, the Court held that the phrase "any civil action" found in Sec. 1404 (a) was applicable to an action under the Federal Employers' Liability Act. In so doing the Court stated (page 58):

> "The court below relied on the language of Sec. 1404 (a), *supra*, which it regarded as 'unambiguous, direct, clear.' We agree. The reach of 'any civil action' is unmistakable. The phrase is used without qualification, without hint that some should be excluded."

In our view, the phrase "where it might have been brought" contained in the same section is equally unambiguous, direct and clear.

Notwithstanding the emphatic view which we entertain, it must be conceded that a solution of the problem has engendered much controversy in the courts and that there is respectable opposing authority, although upon analysis it is not as imposing as counsel would have us believe. An attempt to distinguish or analyze such cases in detail would unduly prolong this discussion. A reading of all the cases where the question has been considered leads to the view that the weight of authority sustains our conclusion in the matter.

Respondent asserts that four Courts of Appeals have sustained the power of the court to transfer under the circumstances of the instant case. *Ex Parte Blaski et al.*, 245 F. 2d 737 (5 Cir.); *In Re Josephson*, 218 F. 2d 174 (1 Cir.); *Anthony* v. *Kaufman*, 193 F. 2d 85, and *Torres* v. *Walsh*, 221 F. 2d 319 (2 Cir.); *Paramount Pictures, Inc.* v. *Rodney*, 186 F. 2d 111 (3 Cir.). We regard *Blaski* as

the most important of these cases because the Court refused to entertain a petition for mandamus directing the Texas District to vacate its order of transfer in the instant case. With great respect for that Court, we think its opinion discloses that it, like some other Courts, confused the issue of power to transfer with that of discretion where the power existed. In its opinion the Court stated (page 738):

> "The purposes for which Sec. 1404 (a) was enacted would be unduly circumscribed if a transfer could not be made 'in the interest of justice' to a district where the defendants not only waive venue but to which they seek the transfer."

This reasoning, so we think, ignores the statutory limitation of the power to transfer to a district "where it might have been brought." More than that, a court has no more right to unduly enlarge than it has to unduly circumscribe a limitation which Congress has specifically provided. In any event, we think the decision of the Fifth Circuit in this matter is erroneous. Such being the case, we are under no more obligation to follow it as the law of the case than that Circuit would be to follow what it considers an erroneous decision by this Court. See *Wilson* v. *Kansas City Southern Ry. Co. et al.*, 101 F. Supp. 56, 60.

In all the other cases above cited, except *Torres* v. *Walsh*, it appears that one or more of the defendants could have been sued in the district to which the action was transferred. Thus, the action "might have been properly brought" in such district. The *Torres* case involved an *in rem* proceeding in admiralty which presented a different situation as to venue and service. Notwithstanding that some points of distinction may be drawn between the cited cases (except *Blaski*) and the instant case, it is fair to state that all of these cases contain language which in one way or another supports the power of the Texas Court in the instant matter.

The case most relied upon by respondent is *Paramount Pictures, Inc.* v. *Rodney*, 186 F. 2d 111. This case was decided by a court of five judges, two of whom dissented (Judges Hastie and McLaughlin). With due respect to the majority, we agree with the reasoning and logic of the dissenting opinion. The dissent states (page 119):

> "But we do not see how the conduct of a defendant after suit has been instituted can add to the forums where 'it might have been brought.' In the normal meaning of words this language of Section 1404 (a) directs the attention of the judge who is considering a transfer to the situation which existed when suit was instituted."

In agreeing with the dissenting members of that Court, we find ourselves in good company. In *General Electric Co.* v. *Central Transit Warehouse Co. et al.*, 127 F. Supp. 817, Judge Whittaker (then a District Judge, now a Justice of the Supreme Court) also agreed with the dissenting members in the *Paramount Pictures* case. More than that, he analyzed and distinguished that case on its facts. In our view, the opinion by Judge Whittaker is sound. His reasoning and logic is unassailable and we think he reached the correct result. A striking statement in his opinion, referring to the construction, there sought as it is here, of the phrase "where it might have been brought," is (page 826):

> "Would not such construction be to read that phrase entirely out of the statute? Would not such construction permit transfer of the action to *any district desired by the moving defendants*, though they, or some of them, could not have been served with process there, and no statutory venue existed there, and the action could not have been maintained there, without their intentional waiver of venue and entry of general appearance? I think no such treatment can be given to that phrase in the statute. It, says Judge

> Learned Hand, " 'presupposes at least two forums in which the defendant is amenable to process.' " *Foster-Milburn Co.* v. *Knight*, 2 Cir., 181 F. 2d 949, 952."

We have read with interest Judge Hoffman's opinion. He makes a fair and detailed analysis of numerous cases. His counsel in this Court stated, "We, as counsel, cannot improve upon the discussion of the law on this subject which was included in Respondent's opinion." We agree that counsel have not improved upon Judge Hoffman's opinion. Among other things he stated:

> "Gentlemen, personally I am of the opinion that the dissent in *Paramount* against *Rodney* is supported by the greater weight of reason and logic and that this Court, if I were to rely on my own personal inclination should retransfer this case to Texas.
>
> "Those cases supporting transfer to this district, I think, do great violence to the established rules of statutory construction.
>
> "They seem to create a doctrine of retroactive waiver in order to reach the conclusion that the action might have been brought."

After having thus reasoned, he concluded:

> "I feel, however, I must follow the law as it appears to me to be established, especially in view of the fact that the Supreme Court has consistently refused to grant certiorari to those cases supporting transfer to this district."

It thus appears that respondent reasoned one way and decided the other. Certainly he had no sound basis for attaching weight to the fact that the Supreme Court has refused to grant certiorari in the cases supporting transfer. See *Agoston* v. *Commonwealth of Pennsylvania*, 340 U.S. 844, 845.

We have heretofore quoted from Judge Whittaker's opinion in *General Electric Co.* v. *Central Transit Warehouse Co. et al.*, 127 F. Supp. 817, which includes a statement from *Foster-Milburn Co.* v. *Knight* (2 Cir.), 181

F. 2d 949, 952, that it (referring to Sec. 1404 (a)) "presupposes at least two forums in which the defendant is amenable to process." This Court, in *Chicago, R.I. and P.R. Co.* v. *Igoe*, 212 F. 2d 378, 379 (footnote), cited with approval the statement from the *Foster-Milburn* case. Numerous District Courts have embraced this view of the transfer section. *Nachtman* v. *Jones & Laughlin Steel Corp.*, 90 F. Supp. 739, 740; *Wilson* v. *K. C. Southern Ry. Co. et al.*, 101 F. Supp. 56; *Johnson* v. *Harris*, 112 F. Supp. 338, 341; *Mitchell* v. *Gundlach*, 136 F. Supp. 169, 172; *Felchlin* v. *American Smelting & Refining Co.*, 136 F. Supp. 577, 581; *Hill* v. *Upper Mississippi Towing Corp.*, 141 F. Supp. 692, 694; *Gilpin* v. *Wilson*, 148 F. Supp. 493.

In the last cited case, the latest which we find on the subject, the Court after reviewing the case law decided that the transferee district must be one where the action might have been originally brought. In so deciding, the Court stated (page 494):

> "The Court, while recognizing the divergence of authority on this question, is persuaded that a district wherein the action 'might have been brought' infers that the transferee district must be not only a district wherein venue lies and a complaint may be filed, as indeed one may file a complaint at will, but the transferee district must also be one in which the action might have been legally maintained and service of process effected upon the defendant. This view comprises the weight of authority and is represented by well-reasoned decisions from both the Second and Ninth Circuits."

(*Foster-Milburn Co.* v. *Knight*, 2 Cir., 181 F. 2d 949, and *Shapiro* v. *Bonanza Hotel Co.*, 9 Cir., 185 F. 2d 777.) The Court in *Gilpin* cites other cases which have expressed the same view, including *Blackmar* v. *Guerre et al.* (5 Cir.), 190 F. 2d 427, 429, wherein the Court stated:

> "Transfer under those sections [1404 (a) and 1406 (a)] is limited to districts where the suit could be originally brought. [Citing cases.]"

In *Ex Parte Collett*, 337 U.S. 55, the Court considered the doctrine of *forum non conveniens* as it relates to Sec. 1404 (a). In that connection, the Court discussed the transfer section together with the venue provision there involved. While the issue in the instant case was not directly involved, we think the reasoning by analogy supports the view that the transferee district must be one where the action could have been properly brought. (See pages 59 and 60.) Counsel for respondent attempt to escape the reasoning of *Collett* on the basis of *Norwood* v. *Kirkpatrick*, 349 U.S. 29, which it is claimed broadened the scope to be awarded Sec. 1404 (a). The suggestion is without merit. *Norwood* had nothing to do with the statutory limitation on the power of a District Court to transfer. The case is concerned solely with the matter of the Court's discretion. The Court stated (page 32):

> "As a consequence, we believe that Congress, by the term 'for the convenience of parties and witnesses, in the interest of justice,' intended to permit courts to grant transfers upon a lesser showing of inconvenience. This is not to say that the relevant factors have changed or that the plaintiff's choice of forum is not to be considered, but only that the discretion to be exercised is broader."

For a discussion of the *Norwood* case see *Clayton* v. *Swift & Co.*, 137 F. Supp. 219, 221.

So that there will be no misunderstanding as to our position on the power of a District Court to transfer an action to another district, we refer to a recent opinion of this Court. *General Casualty Co.* v. *Grubb*, 253 F. 2d 51. Unfortunately this case is sometimes cited in support of the thesis that a District Court has the power to transfer to a forum where the action could not have

been originally brought. Whether the issue of power was before the Court in the *Grubb* case the opinion does not disclose. If so, it is evident that the issue was undecided. The case was decided solely on the issue of the District Court's discretion to order the transfer. As the Court stated (page 53):

> "On the other hand, we are appraising discretion exercised under Sec. 1404 by the district court and all we can do is to determine whether the respondent Judge abused it while at the same time, guarding against substituting our discretion for his."

The writ of mandamus is allowed, and respondent is directed to vacate and set aside his order entered March 14, 1958, and to order the action remanded to the United States District Court, Northern District of Texas, Dallas Division.

FINNEGAN, *Circuit Judge*, Dissenting. An opinion in this case, written by me, and in which Judge Major and Judge Schnackenberg joined with me, was handed down July 1, 1958. Now my two colleagues have changed their position, and on rehearing ordered withdrawal of our earlier unanimous opinion. Since I adhere to my original position of refusing the peremptory writ of mandamus in this case, I am explaining my reasons for dissenting.

At the outset, I underscore two items. (1) The record underlying this current majority opinion has remained unchanged since the day when we three judges handed down our first *Blaski* opinion. (2) John F. Blaski, MPH Manufacturing Corporation, Inc., Peter S. Pedersen, Peter S. Pederson, Jr., co-partners d/b/a Central Farm Equipment Company, petitioners here, had earlier, October 3, 1955, sought a writ of mandamus in our Court to expunge Judge Tehan's order transferring their case brought in the Eastern District of Wisconsin against Inland Steel

Products Company, LeRoy Hermann and Robert Anderson, defendants, from the Eastern District of Wisconsin to the Northern District of Illinois for consolidation with other suits then pending in the latter District Court. Those cases involve the same patent as the case at bar. Judge Schnackenberg joined with Judge Lindley in an order, entered October 3, 1955, denying the petition of Blaski, et al. for mandamus. The petition for a writ of mandamus in that case shows Blaski, et al. challenged the power of Judge Tehan to transfer, or in the alternative, claimed the District Judge abused his discretion.

Ex Parte Blaski, 245 F. 2d 737 (5th Cir. 1957) is the Fifth Circuit's opinion denying leave to file a petition for a writ of mandamus to vacate the order entered by the United States District Court in Texas transferring the case at bar to the Northern District of Illinois. Judge Jones, speaking for the Fifth Circuit, when rejecting the petition presented by Blaski, et al., pointed out (245 F. 2d 737):

> "The movants here, who were plaintiffs in the district court, have their *residence* in the Northern District of Illinois. They instituted suit in the district court for the Northern District of Texas against several defendants, all of whom reside in the Northern District of Texas . . . The defendants made a motion to transfer the cause, pursuant to 28 U.S.C.A. § 1404(a), to the Northern District of Illinois. In their motion the defendants stated that their witnesses were much closer to the court in Illinois than to the court in Texas. They also state, among other averments, *that there is pending in the district court for the Northern District of Illinois a consolidated action in which the plaintiffs in the Texas suit were charging* infringement of the *same patent as was involved in the suit in Texas.* It was shown that in the action in the Northern District of Illinois much pre-trial information and evidence had been developed which would

be relevant in the case commenced in the Northern District of Texas. *The defendants waived their right to be sued in the Northern District of Texas and consented to the consolidation of the action with the cause pending in Illinois.* . . . .

"The plaintiffs say that none of the defendants reside in Illinois and have not committed in Illinois any acts of infringement, that process issued in Illinois could not have been served on the defendants and therefore the action could not "have been brought" in the district to which it was transferred. The attempted waiver, the plaintiffs say, is ineffectual." (Italics supplied)

As I understand Judge Major's opinion in this rehearing, he holds that unless there is venue under 28 U.S.C. § 1400 in at least two forums, a trial judge is restrained from basing any order of transfer on 28 U.S.C. § 1404 (a). In reaching that result Judge Major disagrees, as I view it, with the Fifth Circuit that a transfer is proper on motion of a defendant who consents to the transfer (by waiving venue in the transferor court) even though the defendant is not amenable to venue in the transferee court selected by such movant, I doubt if any one would seriously urge that the *Fourco Glass Co.* v. *Transmirra Corp.*, 353 U.S. 222 (1957) holding precludes all transfers of patent cases when § 1404 (a) is involved, especially after noticing the words "any civil action" used by Congress in § 1404 (a).

Literally speaking, the defendants-litigants in the case before us, "waived their right to be sued in the Northern District of *Texas*" [See 245 F. 2d 737]; they did not, with all deference to Judge Major, waive venue "in a forum in which an action had not been and could not be properly brought by an opposing party."

Venue under 28 U.S.C. § 1400 (b) means only the place where these defendants could require the case to be tried and, as a word "venue" refers neither to jurisdiction nor power to decide the case. Locality of trial is a personal privilege which these defendants could waive. *In Re Josephson*, 218 F. 2d 174, 184-185 (5th Cir. 1954), and cases there collected. Venue for commencing patent suits is predetermined by § 1400 (b), but there is nothing in that section contained preventing the place of trial from being shifted in accordance with the yardsticks of "the convenience of parties and witnesses in the interest of justice," provided by § 1404. These Texas defendants have consented to consolidation of the Texas suit with those long since pending in Illinois.

I think the Fifth Circuit penetrated the problem at hand and soundly concluded that:

> "The rule which to us seems the better reasoned and which has been adopted by the majority of the courts, permits the transfer upon the motion or with the consent of the defendants even though they could not have been served with the process of the transferee court . . ." (245 F. 2d 737, 738).

Judicial discretion came into play after the defendant waived venue in Texas and consented to the consolidation with Illinois pending litigation on the same patents. Rather than abuse of discretion I find the District Judge in Texas displayed some sound practical common sense. Indeed I think the bare words "where it might have been brought" in § 1404 (a), are being used here as an intellectual go-cart just to wheel the case back again to Texas. This case ought to be resolved on its peculiar facts and against the background of lawsuits begun by Blaski, et al. in Wisconsin and Texas. As I have previously said, there

appears to be no legalistic reason just why the respondent judge should overrule the Fifth Circuit. I would deny the petition for writ of mandamus just as I would have struck down a petition in the nature of a writ prohibition, which at least would have been potentially more appropriate.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. [redacted] 26

HONORABLE PHILIP L. SULLIVAN, Chief Judge of the United States District Court for the Northern District of Illinois,

Petitioner,

vs.

OTTO BEHIMER and JOHN A. ROBERTS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF IN OPPOSITION.

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IN THE

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BRIEF IN OPPOSITION.

OPINIONS BELOW, JURISDICTION, STATUTE INVOLVED AND QUESTION PRESENTED.

The opinions below, jurisdictional requisites, statute involved and the question presented are adequately set forth in the petition.

ARGUMENT.

I.

NO CONFLICT EXISTS WITH OTHER CIRCUITS.

Petitioner cites five cases in circuits other than the Seventh Circuit as holding venue by consent is sufficient to give the transferee court jurisdiction within the meaning of § 1404(a): *Ex Parte Blaski*, 245 F.2d 737 (5 Cir. 1957), cert. denied, 355 U.S. 872; *In Re Josephson*, 218 F.2d 174 (1 Cir. 1954); *Anthony* v. *Kaufman*, 193 F.2d 85 (2 Cir. 1951), cert. denied, 342 U.S. 955; *Torres* v. *Walsh*, 221 F.2d 319 (2 Cir. 1955), cert. denied, 350 U.S. 836; and *Paramount Pictures* v. *Rodney*, 186 F.2d 111 (3 Cir. 1950), cert. denied, 340 U.S. 953.

In each of these cases, except *Ex Parte Blaski*, the court either directly or by implication pointed out the fact that under the venue statute governing the particular case, suit could have been brought, in the first instance, in the transferee district. In *Torres* v. *Walsh*, *supra*, the Second Circuit permitted transfer of two cases saying that in one, the libel could have been brought in Puerto Rico (the transferee district), as a libel against a vessel may be brought in any district where the vessel may be found, and the vessel had been in Puerto Rico from time to time, and the Pennsylvania Railroad could have been sued in Pennsylvania (the transferee district), but that

> ". . . it may not be doubted that the Congress intended no transfer in any case where the transferee Court lacked competence to proceed." p. 321.

In *In Re Josephson*, *supra*, the principle of concurrent jurisdiction is succinctly stated and recognized at page 183:

> "In the present case we understand petitioner to concede, and rightly so, that jurirsdiction of the subject matter, and proper venue, exist both in the federal court for the District of Massachusetts and in the federal court for the District of New Mexico. The two districts have jurisdiction under 28 U.S.C. § 1332 (a) (1) . . ."

In *Anthony* v. *Kaufman, supra,* the court recognized the principle of dual jurisdiction, saying at page 86:

> "If, however, the district judge lacked power to make his order of transfer, we will entertain such a petition. See *Foster-Milburn Co.* v. *Knight,* 2 Cir., 181 F.2d 949. In that case, the defendant, which could not have been served in the transferee district, objected to the transfer, and we issued a mandamus writ. But here, one defendant could have been served in the transferee district . . ."

Paramount Pictures v. *Rodney, supra,* was a suit under the Clayton Act against fourteen defendants, nine of whom were doing business in Texas. The court pointed out that under the provisions of the anti-trust laws, 28 U.S.C. § 1337:

> "Suits embracing the identical subject matter could have been brought and, literally, 'might have been brought', by the plaintiffs against the defendants in any district court in Texas." p. 114.

II.

NO INTRA-CIRCUIT CONFLICT EXISTS.

Petitioner relies upon *General Casualty Co.* v. *Grubb,* 253 F. 2d 51 (7th Cir. 1958), cert. denied, 357 U.S. 907, as showing an intra-circuit conflict. Petitioner interprets that case far differently from the interpretation of the

court itself. The position of the Seventh Circuit and its interpretation of the *Grubb* case is clearly shown in the following quotation from *Blaski* v. *Hoffman*, 260 F. 2d 317, 324:

> "So that there will be no misunderstanding as to our position on the power of a District Court to transfer an action to another district, we refer to a recent opinion of this Court. *General Casualty Co.* v. *Grubb*, 253 F. 2d 51. Unfortunately this case is sometimes cited in support of the thesis that a District Court has the power to transfer to a forum where the action could not have been originally brought. Whether the issue of power was before the Court in the *Grubb* case the opinion does not disclose. If so, it is evident that the issue was undecided. The case was decided solely on the issue of the District Court's discretion to order the transfer."[1]

Rehearing was denied *En Banc* on Nov. 25, 1958 by the Seventh Circuit in the *Blaski* case. No intra-circuit conflict exists.

III.

IMPORTANCE OF QUESTION.

With the exception of *Ex Parte Blaski, supra*, the decisions of the various circuits interpret the clear and explicit phrase of § 1404(a) "where it might have been brought." These decisions reject that phrase as being surplusage and require that the transferee court have jurisdiction under applicable venue statutes with or without the consent of the defendants. This interpretation is clearly correct.

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[1] The motion to transfer in the Grubb case recited that the action for declaratory judgment could have been brought in the transferee court and the district court discussed venue in the transferee court as being supported by the Oklahoma Non-Resident Motorist Statutes. General Casualty Co. v. Keller, 154 F. Supp. 451, 452 (D.C. Wisc. 1957).

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 26

HONORABLE PHILIP L. SULLIVAN, CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS,

Petitioner,

vs.

OTTO BEHIMER AND JOHN A. ROBERTS,

Respondents.

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

DECISIONS BELOW

The opinion (R. 91-94) and judgment (R. 94-95) of the Court of Appeals for the Seventh Circuit issued November 26, 1958, and is reported at 261 F. 2d 467. No opinion was delivered in the District Court. Petitioner's decision, announced orally from the bench (R. 87), is detailed in his answer to the rule to show cause (R. 83-90).

* At the time certiorari was requested, Petitioner was Chief Judge of his district. Subsequently Petitioner, who reached his seventieth birthday on October 2, 1959, relinquished (on April 6, 1959) his position as Chief Judge, though he still continues in regular active service. See Public Law 85-593, 72 Stat. 497; 28 U.S.C. § 136.

JURISDICTION TO REVIEW

Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. §1254(1). The petition for certiorari was filed December 31, 1958. Certiorari was granted herein October 12, 1959.

STATUTE INVOLVED

The statute involved in this case is 28 U.S.C. §1404(a), 62 Stat. 937 (1948), which provides as follows:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

QUESTION PRESENTED

The questioned transfer of this diversity case, a transfer which Petitioner ordered for reasons he felt to be compelling, brings into focus the construction to be given to the clause "where it might have been brought" of Section 1404(a).

Petitioner, acting upon defendants' formal assurances of the entry of their personal appearances and waiver of venue in the transferee forum, ordered the subject action transferred pursuant to Section 1404(a) to the United States District Court for the District of Utah. Since the venue and process of that court had been confirmed by defendants' assurances, and since that court unquestionably had jurisdiction of the subject matter, Petitioner concluded that the action "might have been brought" there at the time he directed its transfer to that forum.

In its narrowest sense the question presented by the facts of this case is whether 28 U.S.C. §1404(a) authorized Petitioner to transfer a civil action for the convenience of

parties and witnesses and in the interest of justice to a district which, having jurisdiction over the subject matter of the action, possessed venue and personal jurisdiction by reason of the defendants' waiver and consent.

More generally phrased, the question is whether (assuming that the circumstances warrant) federal district courts are authorized by Section 1404(a) to transfer a civil action to another district or division of equal power to adjudicate if, after the commencement of the action, the venue and personal jurisdiction of the transferee forum have become perfected by such circumstances as (1) a change in residence of the parties, (2) a plaintiff or defendant corporation's qualification or doing of business in the pertinent State, or (3) a defendant's consent to and acceptance of the venue and process of such forum pursuant to his proposal or that of the plaintiff.

In essence, the issue is simply that of identifying the point in time at which a civil action "might have been brought": Is this time to be measured and the transfer power of federal district courts to be determined at the commencement of the action or at the time of transfer?

STATEMENT OF THE CASE

The present mandamus proceeding grows out of a minority stockholders' suit brought in a representative capacity by two stockholders of a Utah corporation on behalf of themselves and other stockholders of that company who allegedly were similarly situated (R. 8). The other stockholders for whom the two plaintiffs assumed to act were 918 in number, a majority of whom (575) resided in Utah (R. 85). The two plaintiffs were Otto Behimer, a resident of Illinois, and John A. Roberts, a resident of New York (R. 5). The defendants were Standard Oil

Company, an Indiana corporation, and Standard Oil Foundation, Inc., an Indiana charitable corporation, owners respectively of 72.5% and 5.1% of the outstanding stock of the Utah company (R. 5, 6).

The action was filed in the United States District Court for the Northern District of Illinois, a forum which would now be unavailable to the plaintiffs but wherein at that time diversity of citizenship existed.* The requisite amount in controversy was claimed (R. 5). The plaintiffs charged that the sale of the Utah corporation's assets to defendants' newly organized subsidiary, which was authorized to do business in Utah and other western states, was for an inadequate price (R. 33). Defendants, together with 52 other shareholders of the Utah company, were charged with having violated their fiduciary duties (as majority stockholders) to plaintiffs and others similarly situated by permitting the sale to be made at the allegedly inadequate price (R. 8).† The 52 other stockholders who allegedly acted with the defendants were denominated "controlled stockholders" in the complaint (R. 6). With two exceptions, all were residents of Utah (R. 72-75), as were all of the sixteen officers and directors of the Utah corporation (R. 67-68).

---

* Plaintiffs' complaint was filed on February 12, 1958 (R. 5), some five months prior to the amendment (Public Law 85-554), to 28 U.S.C. § 1332 by which "a corporation shall be deemed a citizen of . . . the State where it has its principal place of business." Plaintiffs' counsel states that Standard Oil Company has its principal office in Chicago (R. 78). Taken at its face value, this asserted fact and the Illinois residence of plaintiff Behimer would destroy the diversity jurisdiction. But for the savings clause of the amendment to § 1332, this action would have to be filed elsewhere than in the federal court in Chicago. If filed in the Illinois state courts, the action would be subject to Illinois' *forum non conveniens* rule, *Whitney* v. *Madden*, 400 Ill. 185, 79 N.E. 2d 593 (1948).

† A condition of this sale, which events saw fulfilled, was that it be approved by the affirmative vote of the holders of more than 50% of the outstanding stock of the Utah company other than that stock held by defendants (R. 46, 84).

The substantive charges of the complaint were denied in the answers of the defendants, and on the following day the defendants brought on before Petitioner their motion for a transfer of the action to the United States District Court for the District of Utah, Central Division, pursuant to 28 U.S.C. §1404(a). As part of their motion, defendants formally assured Petitioner that, in the event of the transfer of the suit as requested, their personal appearances would be entered in, and they would waive any legal privilege they might have as to the venue of, the proposed transferee forum (R. 64).

Petitioner, after having considered the transfer motions, the affidavits furnished on behalf of the parties, and the briefs filed with him by counsel, ordered the transfer, which he found to be for the convenience of the parties and witnesses and in the interest of justice (R. 80-81). Present in the case were eight reasons by which Utah was demonstrated to be the appropriate forum, reasons which have been detailed by Petitioner and which, he felt, were compelling of transfer (R. 88, 90).* Among them was the cir-

* Petitioner's determination that a transfer would be "[f]or the convenience of parties and witnesses, in the interest of justice" was based (R. 88-89) upon:

1. The Utah residence of the majority of the class for whom plaintiffs nominated themselves as representatives;
2. The Utah residence of fifty of the "controlled stockholders" and of all sixteen of the officers and directors of the Utah corporation;
3. The location in Salt Lake City of all the books and records of the Utah corporation;
4. The situs of the assets, whose sales price plaintiffs assert was inadequate, in Arizona, Colorado, Idaho, Nevada, Oregon, Utah, Washington and Wyoming;
5. The availability in Utah of the purchasing corporation;
6. The disruption of the business of the purchasing corporation were its officers and directors to attend pre-trial and trial proceedings in Chicago;
7. The circumstance that the substantive law of Utah governs the cause of action; and
8. The comparative calendar conditions of the Chicago and Salt Lake City districts.

cumstance of the Utah residence of a large majority (575) of the class for whom plaintiffs assumed to act, most of which class had affirmatively approved the sale which plaintiffs sought on their behalf to condemn (R. 84). Petitioner in consequence was concerned that the interest of all the members of the class be safeguarded (R. 85), and Petitioner concluded that, given the power to transfer, he would be guilty of an abuse of discretion were he to refuse to exercise that power (R. 86, 90).

Plaintiffs, respondents here, petitioned the Court of Appeals for the Seventh Circuit for a writ of mandamus to compel Petitioner to vacate his transfer order (R. 1-4). That court, without concerning itself with the reasons for the transfer (R. 93), held that Petitioner had no power to make the transfer and entered judgment for the writ of mandamus (R. 95). Because the Seventh Circuit's decision conflicted with the decisions of four other courts of appeal on an important question of federal law, Petitioner sought a writ of certiorari to have the question reviewed by this Court.

SUMMARY OF ARGUMENT

I. It is Petitioner's thesis that 28 U.S.C. §1404(a) is to be construed in such a fashion as to enable the federal district courts to transfer a civil action to another district for the convenience of the parties and witnesses and in the interest of justice if that district is fully available to the parties at the time of transfer. If at such time, any precedent disabilities in the venue and personal jurisdiction of the transferee forum have been obviated, and if at such time the transferee forum has the power to adjudicate the issues of the action, it is a forum in which the action might then have been brought.

A. The text of Section 1404(a) indicates the propriety of this construction, by which the existence of the power to transfer is to be determined as of the time it is to be exercised. Such a construction is grammatically sound and comports with the sense of the section: that trial convenience and the interest of justice are to be determined by what can be accomplished at the time of transfer. Such construction does not make the section's concluding clause meaningless or surplusage.

B. To test the existence of the power to transfer (which is a corollary to the full availability of the more convenient forum) at the time of its exercise is to give Section 1404(a) a scope of action which is at least as broad as that afforded to the courts under the doctrine of *forum non conveniens*, the progenitor of the section. It would be strange indeed if Section 1404(a), which was intended to be remedial and a valuable aid to judicial administration, were to be denied the usefulness which its antecedent possessed and upon which the section was meant to improve. Nothing in the doctrine of *forum non conveniens* commanded that the availability of the more convenient forum be determined at the time suit was commenced; on the contrary *forum non conveniens* courts dismiss in favor of a jurisdiction made available during suit.

II. Petitioner's construction of Section 1404(a) gives full effect to the broad remedial purpose of that statute. The section, being remedial, should not be narrowly construed nor should its utility be curtailed. The choice of transferee forums should be at least as broad as that afforded by the doctrine of *forum non conveniens*. All Courts of Appeal

except the court in the instant case have sustained the transfer power of the federal district courts on the basis of circumstances prevailing at the time of transfer. This is Petitioner's construction and his thesis.

ARGUMENT

I.

THE QUALIFYING CLAUSE OF SECTION 1404(a) REFERS TO DISTRICTS IN WHICH THE ACTION "MIGHT HAVE BEEN BROUGHT" AT THE TIME OF TRANSFER.

The federal district courts, by reason of 28 U.S.C. § 1404(a), have had the authority for the last eleven years to transfer civil actions for the convenience of the parties and witnesses and in the interest of justice. Such authority is unquestionably a valuable aid in judicial administration, obviating as it does the sometimes harsh consequences which a dismissal under the antecedent doctrine of *forum non conveniens* might entail and which a transfer avoids. *Norwood* v. *Kirkpatrick*, 349 U. S. 29 (1955); *Jiffy Lubricator Co.* v. *Stewart-Warner Corporation*, 177 F. 2d 360 (4th Cir. 1949).

Such transfer authority, however, is obviously not unlimited. In the language of the statute which creates the authority, it may be utilized only to direct an action to any other district or division "where it might have been brought." In this respect, the statute finds a counterpart in earlier *forum non conveniens* decisions that require an alternate forum in which plaintiff might proceed if his action be dismissed. Cf. *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 507 (1947).[1] In granting *forum non conveniens* dis-

[1] "In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them." 330 U. S. 501, 506-507.

missals, courts have made sure that the alternate "convenient" forum is fully available and have stayed their order or dismissed upon the condition that proper appearances be made or security be filed in that forum, *Canada Malting Co.* v. *Paterson Co.*, 285 U. S. 413, 424 (1932) (libels in admiralty *in personam*), or that appearances be entered and defenses be waived in that forum, *Vargas* v. *A. H. Bull Steamship Co.*, 44 N. J. Super. 536, 131 A. 2d 39, 40, 48 (Law Div. 1957), aff'd. per curiam on opinion below, 25 N. J. 293, 135 A. 2d 857 (1957), cert. denied, 355 U. S. 958 (1958) (personal injury actions under the Jones Act).

Decisions under the predecessor doctrine of *forum non conveniens* are helpful, therefore, in construing the statutory limitation on the exercise of the transfer power conferred by Section 1404(a). They suggest two crucial considerations: First, the convenient—the transferee—forum must be fully available. Second, such availability is to be measured at the time the transfer is directed, and should not be geared to some previous point in time.

In conformity with the first consideration, then, Petitioner assumes that to "bring" an action means something more than to commence it by filing a complaint.[2] It should in Petitioner's view entail the ability not only to file a complaint but to pursue the action to an effective determination on the merits. This means, in short, that the forum should possess (1) jurisdiction over the subject matter of the suit, the "power to adjudicate"[3]; (2) venue; and (3) jurisdiction

[2] Compare *Paramount Pictures* v. *Rodney*, 186 F. 2d 111, 114 n. 7 (3rd Cir. 1950), citing *Goldenberg* v. *Murphy*, 108 U.S. 162, 163 (1883), for the thought that "commenced" is synonymous with "brought."

[3] *Neirbo* v. *Bethlehem Corp.*, 308 U. S. 165, 167 (1939).

over the person of the parties.[4] An action may be "brought" —not otherwise—in a forum which possesses these elements. That is an available forum.

In conformity with the second consideration, the availability of the transferee forum should be determined as of the time the transfer power is invoked. As Petitioner views it, if the action might have been brought there at the time of transfer, the power to transfer exists. And if the "convenience of parties and witnesses" and "the interest of justice" so require, the power should be exercised.

The text, the purpose and the background of Section 1404(a) all indicate the propriety of this second consideration and support the validity of the statutory construction suggested above. As for the *background* of the section, its antecedent is the doctrine of *forum non conveniens*,[5] where the availability—in a full and effective sense—of the more convenient forum is determined at the time of dismissal. The *purpose* of the section is remedial,[6] and so construed its benefits accrue not only to defendants, but as well to plaintiffs, whose interest in transfer may be

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[4] Compare *In re Josephson*, 218 F. 2d 174, 185 (1st Cir. 1954), where Chief Judge Magruder indicated that service of process, once effected in the transferor forum, becomes superfluous in the receiving forum.

[5] The Reviser's Notes to Section 1404(a) state that that statute was "drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though venue is proper."

[6] Ex parte Collett, 337 U.S. 55, 71 (1949).

equally if not more keen.[7] Finally, Petitioner's construction is the one indicated by the *text* of the statute itself.

A. Petitioner's Construction Is In Accordance With The Text Of Section 1404(a).

If, as Petitioner assumes, his power to transfer is dependent upon the full availability of the more convenient forum —one which possesses venue and jurisdiction both of subject matter and of parties—when is this availability to be determined? It is Petitioner's belief, and the construction which he respectfully submits to this Court, that the existence of his power to transfer is to be determined as at the time he exercises it.

1. Such Construction Is Grammatically Proper.

Grammatically speaking, Petitioner's construction accords with the tense (the pluperfect) and the mood (the subjunctive) of the clause "where it might have been

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[7] There are numerous reported instances of Section 1404(a) transfer motions by plaintiffs. E.g., *Shapiro* v. *Bonanza Hotel Co.*, 185 F. 2d 777 (9th Cir. 1950); *Gilpin* v. *Wilson*, 148 F. Supp. 493 (M.D. Ala. 1957); *Anschell* v. *Sackheim*, 145 F. Supp. 447 (D. N. J. 1956); *Mitchell* v. *Gundlach*, 136 F. Supp. 169 (D. Md. 1955); *Rogers* v. *Halford*, 107 F. Supp. 295 (E. D. Wis. 1952); *United States* v. *Reid*, 104 F. Supp. 260 (E. D. Ark. 1952); *Herzog* v. *Central Steel Tube Co.*, 98 F. Supp. 607 (S. D. Iowa, 1951); *Otto* v. *Hirl*, 89 F. Supp. 72 (S. D. Iowa, 1950); *McCarley* v. *Foster-Milburn Co.*, 89 F. Supp. 643 (W.D. N.Y. 1950), mandamus indicated, sub nomine *Foster-Milburn* v. *Knight*, 181 F. 2d 949 (2d Cir. 1950). The case last-cited, for example, was a wrongful death action by a California administrator against the manufacturer and distributor of a bottled substance that allegedly caused the decedent's death. After instituting suit in the Western District of New York, where defendants were amenable to service of process, plaintiff moved to transfer the action to California, that being the state of his residence, where the decedent had lived, where the consumption of the bottled material occurred, where the death took place, and where the witnesses resided.

brought." The phrase "might have been" obviously speaks of a potential measured against circumstances prevailing at a certain point in time. If this be an accurate grammatical analysis, the point in time at which the governing circumstances are to be ascertained may as properly be the time of transfer as some precedent occurrence such as the commencement of the action. Section 1404(a), in other words, may as correctly be read in terms of "where it might (then) have been brought" as in terms of "where it might (originally) have been brought." In substance, this is precisely what Chief Judge Biggs meant when, after an *en banc* consideration, he wrote in *Paramount Pictures* v. *Rodney*, 186 F. 2d 111, 114 (3rd Cir. 1950):

> "... [t]he difference between the phrase 'might have been brought' of Section 1404(a) and that employed in this opinion, 'could now be brought,' is no more than one of tense and grammar, the imperfect subjunctive as compared to the pluperfect subjunctive. Surely Congress did not intend the effect of an important remedial statute to turn upon tense or a rule of grammar."

In either case, according to Judge Biggs, if the events had occurred at the time of transfer which would make the more convenient forum available (in *Paramount*, the waiver of the venue privilege accomplished this), then the phrase "might have been" of Section 1404(a) was satisfied.

Perhaps more to the point, the existence of the power to transfer should be determined as at the time the power is exercised rather than at some precedent point in time when, in the interval, circumstances might have changed either to conform or to conflict with the requirement for the full availability of the more convenient forum. If in the interval between suit and transfer a forum becomes unavailable—

as by the withdrawal from it of diversity jurisdiction[8]—the venue provision in Section 1404(a) should not be grammatically interpreted as preserving the otherwise terminated subject matter jurisdiction of the transferee forum.

Stated otherwise, a plaintiff in a diversity case may wish to transfer to a district to which he or defendant has moved since the filing of the action, or oppose a transfer to a district formerly but no longer proper. Should not the former be permitted, and should not the latter be denied? The power to transfer should not be geared to antecedent circumstances now changed. Petitioner respectfully submits that if a federal district court "may transfer" a case to another district "where it might have been brought," the determinative point from which the then antecedent availability of the more convenient forum is to be viewed is, grammatically speaking, the time of transfer.

2. Such Construction Comports With The Sense Of Section 1404(a).

Petitioner suggests that the federal district judge, when considering the utilization of Section 1404(a), must determine the matter of convenience and the interest of justice as at the time of transfer and not by reference to some precedent time. The residence of parties and witnesses do change, and what once was in the interest of justice may not now be. If this be true—and assuredly no one disputes this—then should not the existence of the transfer power be measured contemporaneously with the factors upon

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[8] An illustration of such a situation is suggested by the amendment of July 25, 1958 to 28 U.S.C. § 1332. If Petitioner is correct in his construction, transfer of a diversity case to a State wherein plaintiff resides and where defendant has its principal place of business, would, after that amendment, be improper.

which its exercise depends, specifically at the time transfer is to be directed or denied?

This suggestion of a harmonious contemporaneity in the construction of Section 1404(a) has been aptly stated in *Vargas* v. *A. H. Bull Steamship Co.*, 44 N. J. Super. 536, 131 A. 2d 39, 46 (Law Div. 1957):

> ". . . In other words, the federal courts hold that the 'convenience of parties and witnesses' and 'interest of justice' are to be determined by what can now be accomplished, not by what might have been."

This quotation suggests the analogy to be found in those cases which have applied the present power to transfer under Section 1404(a) to actions brought prior to the existence of the power. *Ex parte Collett*, 337 U. S. 55 (1949); *United States* v. *National City Lines*, 337 U. S. 78 (1949).[9] The Court found nothing improper in applying this remedial provision to pending actions. *Ex parte Collett*, 337 U. S. 55, 71 (1949).

3. Such Construction Does Not Make Surplusage Of The Concluding Clause Of Section 1404(a).

The Seventh Circuit in *Blaski* v. *Hoffman*, 260 F. 2d 317, (No. 25 this Term), on the authority of which the instant case was decided, has felt that the clause "where it might

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[9] It is of interest to note that in the National City Lines case, several defendants—as to whom venue might not be proper in the federal district court in Chicago—had stipulated in the federal court in California that they would not raise the question of whether—in the event of a *forum non conveniens* dismissal— the Chicago forum would be a proper venue as to all defendants under Section 5 of the Sherman Act, which controlled venue in that case. 7 F.R.D. 456, 466. This same stipulation was before the California court in the subsequent transfer phase of that case, 80 F. Supp. 734, 743, and apparently satisfied that court that the action had become properly transferable. Its transfer was approved in 337 U. S. 78, though the question of such a post-complaint waiver of venue was not argued to this Court.

have been brought" would become mere surplusage if transfer were to be authorized by a post-complaint satisfaction of the venue and process requirements of the transferee forum. In such event, that court stated, the clause would be meaningless and "[t]he transfer provision would be complete absent the phrase of limitation." 260 F. 2d 317, 320.

In stating this view, the Seventh Circuit repeats an argument which Judge Hastie set forth in his dissent in the *Paramount Pictures* case,[10] and which several thoughtful district courts have noted and accepted.[11]

But this argument overlooks the circumstance that the transferee forum must be one which, in addition to venue and process, has jurisdiction over the subject matter of the action, "the power to decide the issues in the suit."[12] Section 1404(a) does not enlarge or diminish this power, which must exist in the transferee forum independently of Section 1404(a) and of the consent of the parties.[13] The presence of this consideration, then, gives substantial content to the concluding clause of Section 1404(a). By reason of its inclusion an action may not be transferred to a forum which at the time of transfer lacks the power to adjudicate because of some constitutional infirmity or absence of statutory

[10] *Paramount Pictures* v. *Rodney*, 186 F. 2d 111, 116, (3rd Cir. 1950) (dissenting opinion), cert. denied, 340 U. S. 953 (1951).

[11] *General Electric Co.* v. *Central Transit Warehouse Co.*, 127 F. Supp. 817, 826 (W.D. Mo. 1955); *Felchlin* v. *American Smelting and Refining Co.*, 136 F. Supp. 577, 580-581 (S. D. Calif. 1955).

[12] *Mississippi Publishing Co.* v. *Murphree*, 326 U. S. 438, 445 (1946).

[13] A civil action may be brought only in those federal district courts which are constitutionally empowered and statutorily permitted to hear and determine the issues in suit. While venue and personal jurisdiction, being matters of personal privilege, may be satisfied by consent, the "lack of jurisdiction of a federal court touching the subject matter of the litigation cannot be waived by the parties . . ." *United States* v. *Griffin*, 303 U.S. 226, 229 (1938).

authorization. Consequently, the concluding clause of Section 1404(a) does not become surplusage and is not rendered meaningless by the post-complaint satisfaction of the venue and process requirements of the transferee forum.

A number of transfer cases implicitly recognize this. They fall into four groups.

First, actions to condemn adulterated articles may not be transferred to a district where the articles are not located. Because 21 U.S.C. § 334(a) gives the jurisdiction to condemn only to the district court within whose jurisdiction the articles are found, the action cannot be transferred outside that district, since the transferee forum would not be a forum where the condemnation "might have been brought." *Fettig Canning Co.* v. *Steckler*, 188 F. 2d 715 (7th Cir. 1951), cert. denied, 341 U.S. 951 (1951) (the consent of the parties to the transferee forum held to be without effect); *Clinton Foods* v. *United States*, 188 F. 2d 289 (4th Cir. 1951), cert. denied, 342 U.S. 825 (1951); *United States* v. 23 *Gross Jars, Etc.*, 86 F. Supp. 824 (N.D. Ohio, 1949); *United States* v. *91 Packages*, 93 F. Supp. 763 (D. N. J. 1950); *United States* v. *11 Cases, Ido-Pheno-Chon*, 94 F. Supp. 925 (D. Ore. 1950).[14]

Second, because a federal court has no jurisdiction over a local action (ejectment, trespass, etc.) involving real property outside its territorial limits, *Ellenwood* v. *Marietta Chair Co.*, 158 U.S. 105 (1895); *Pasos* v. *Pan American*

[14] The transfer of admiralty actions *in rem* finds no adverse precedent in these food and drug proceedings. Federal district courts have general admiralty jurisdiction (U. S. Constitution, Art. III, Sec. 2), while the statute under which the condemnation of adulterated articles is authorized specifically limits such actions to the one district in which the articles are found. *Torres* v. *Steamship Rosario*, 125 F. Supp. 496, 497 (S.D. N.Y. 1954), mandamus denied *sub nomine Torres* v. *Walsh*, 221 F. 2d 319 (2d Cir. 1955), cert. denied, 350 U.S. 836 (1955).

Airways, 229 F. 2d 271 (2d Cir. 1956), the limitation of Section 1404(a) transfers to districts where the action "might have been brought" precludes transfer of a local action to a district in which the realty is not located. *Arvidson* v. *Reynolds Metals Co.*, 107 F. Supp. 51 (W.D. Wash. 1952); *United States* v. *11 Cases, Ido-Pheno-Chon*, 94 F. Supp. 925, 926-927 (D. Ore. 1950) (dicta).

Third, the concluding clause of Section 1404(a) prevents the transfer of a diversity case to a district where the parties would have to be aligned in such a manner that no diversity jurisdiction would exist. *Masterpiece Productions* v. *United Artists Corp.*, 90 F. Supp. 750 (E. D. Pa. 1950); *Lucas* v. *New York Central R. Co.*, 88 F. Supp. 536, 537 (S.D. N.Y. 1950).

Fourth, although not strictly a case of subject matter jurisdiction, the concluding clause of Section 1404(a) will preclude the transfer of a diversity case to a district in a State where plaintiff is forbidden from bringing suit by the State's rule against actions by non-resident executors. *Felchlin* v. *American Smelting and Refining Co.*, 136 F. Supp. 577 (S.D. Calif. 1955).

The foregoing authorities adequately demonstrate that the phrase "where it might have been brought" is not made meaningless or "surplusage" when it is construed to prohibit transfers to districts where the parties cannot adjudicate their dispute because of the lack of subject matter jurisdiction.

B. Petitioner's Construction Is Consistent With The Forum Non Conveniens Background Of Section 1404(a)

Equally misplaced as a basis for concluding that Section 1404(a) does not permit transfer to a forum where venue

or personal jurisdiction is satisfied by some post-complaint event is the reliance the courts have placed on *Gulf Oil's* [15] statement that *forum non conveniens* "presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them." [16]

A careful reading of the *Gulf Oil* opinion against the history of the *forum non conveniens* doctrine to which it referred discloses unambiguously that what the Court meant by this passage was that an alternate forum must exist *at the time the Court grants the motion to dismiss.* In other words, in dismissing an action for *forum non conveniens* the court must not leave the plaintiff remediless. In applying the doctrine of *forum non conveniens* the courts of this country do not seem to consider whether a plaintiff had a choice of forums in which to bring his action *originally.* They do consider whether there is *now* an alternate forum in which plaintiff might proceed if his action is dismissed.[17] In instances where the interest of justice and the convenience of parties and witnesses demand trial in a forum in which defendant is not subject to service, the action is dismissed or stayed on the condition that defendant agree to enter a general appearance in the convenient forum.

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[15] *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 507 (1947).

[16] E.g., see *Blaski v. Hoffman*, 260 F. 2d 317, 322-323 (7th Cir. 1958), cert. granted, 359 U.S. 904 (1959); *Paramount Pictures* v. *Rodney*, 186 F. 2d 111, 118 n. 6 (3rd Cir. 1950) (dissent), cert. denied, 340 U.S. 953 (1951); *General Electric Co.* v. *Central Transit Warehouse Co.*, 127 F. Supp. 817, 824 (W.D. Mo. 1955).

[17] Compare the statement in *Re Josephson*, 218 F. 2d 174, 185 (1st Cir. 1954), that a transfer would not be ordered to a district where certain defendants could not be served with process before the transferor court had obtained personal jurisdiction over such defendants; such a prior transfer would not be "in the interest of justice." The same thought is expressed in *Continental Grain Co.* v. *Federal Barge Lines, Inc.*, 268 F. 2d 240, 244 (5th Cir. 1959), cert. granted, No. 229, 1959 Term. The Fifth Circuit there required, as a condition precedent to transfer of that admiralty case, that a claim be filed and the vessel released under bond.

The conditions being satisfied, the time of final dismissal then is determinative of the availability of the alternate, or more convenient, forum in which the action might then have been brought.

The conditional dismissal is a well recognized and approved incident of the doctrine of *forum non conveniens*, being discussed in leading articles on the subject.[18] Cases illustrating this principle are legion. Justice Brandeis' leading *forum non conveniens* opinion, *Canada Malting Co.* v. *Paterson Co.*, 285 U.S. 413 (1932), for example, approved the dismissal of a libel between Canadian parties on the condition (p. 424) "that the respondent should appear and file security in any action which might be instituted by the petitioners in the admiralty courts of Canada, so that petitioners would not by dismissal of the libels lose the security gained by the foreign attachment." This power to grant a *forum non conveniens* dismissal on such conditions has been recently reaffirmed, and its propriety endorsed. *Swift & Co.* v. *Compania Caribe*, 339 U. S. 684, 697-698 (1950).[19]

Of parallel force, and of pertinence to the present controversy, are the decisions where courts have granted *forum non conveniens* dismissals on the condition that defendants appear and consent to service in the more convenient forum when it is clear that plaintiff could not have brought suit there in the first instance. Such cases include:

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[18] Braucher, The Inconvenient Federal Forum, 60 Harv. L. Rev. 908 (1947); Barrett, The Doctrine of Forum Non Conveniens, 35 Calif. L. Rev. 380 (1948).

[19] Other *forum non conveniens* dismissals, on condition defendant post security or waive a defense of statute of limitations, include *Bulkley, Dunton Paper Co.* v. *The Re Salado*, 67 F. Supp. 115 (S.D.N.Y. 1946); *St. Paul Fire & Marine Ins. Co.* v. *The Republica de Venezuela*, 105 F. Supp. 272 (S.D.N.Y. 1952); *Schwartz* v. *Zim Israel Nav. Co.*, 181 N.Y.S. 2d 283 (Sup. Ct. 1958).

a. Federal courts: *The City of Agra*, 35 F. Supp. 351 (S.D.N.Y. 1940); *Libby, McNeill & Libby* v. *Bristol City Line of S.S.*, 41 F. Supp. 386 (S.D.N.Y. 1941); *Galban Lobo Trading Co* v. *The Diponegoro*, 108 F. Supp. 741 (S.D.N.Y. 1952); *Anglo-American Grain Co., Ltd.* v. *S/T Mina D'Amico*, 169 F. Supp. 908 (E.D. Va. 1959); *Giatilis* v. *The Darnie*, 171 F. Supp. 751 (D. Md. 1959).

b. New York courts:[20] *Wendel* v. *Hoffman*, 259 App. Div. 732, 18 N.Y.S. 2d 96 (1940); *Strassburger* v. *Singer Mfg. Co.*, 263 App. Div. 518, 33 N.Y.S. 2d 424 (1942); *Villegas de Jesus* v. *Waterman Steamship Co.*, 286 App. Div. 804, 143 N.Y.S. 2d 618 (1955); *Rodriguez* v. *A. H. Bull Steamship Co.*, 286 App. Div. 804, 143 N.Y.S. 2d 618 (1955); *Ivy* v. *Stoddard*, 147 N.Y.S. 2d 469 (Sup. Ct. 1955).

c. New Jersey courts: *Vargas* v. *A. H. Bull Steamship Co.*, 44 N.J. Super. 536, 131 A. 2d 39 (Law Div. 1957), aff'd. per curiam on opinion below, 25 N. J. 293, 135 A. 2d 857 (1957), cert. denied, 355 U.S. 958 (1958).

Typical of the above case is the *Vargas* decision, involving a seaman's action under the Jones Act (46 U.S.C. § 688) for injuries sustained on defendant's vessel while it was in Puerto Rico. As the defendant (a New Jersey corporation) was not subject to service in Puerto Rico, the action was commenced in the New Jersey state court.

Citing the location of the accident, residence of witnesses, language difficulties, and like considerations, defendants moved for dismissal under *forum non conveniens*, pledging themselves to appear in any action thereafter commenced in Puerto Rico. Plaintiffs resisted, urging the

[20] It is significant that these authorities include no less than four decisions by the appellate courts of New York, a State which has long been a leading jurisdiction in the formulation and application of *forum non conveniens*. Barrett, The Doctrine of Forum Non Conveniens, 35 Calif. L. Rev. 380, 404 (1947).

Gulf Oil "two forums" statement for their proposition that "the doctrine of *forum non conveniens* may be applied only when plaintiff had a choice of forums when he started suit . . . "[21] The court, however, finding no authority which supported this argument, declined to limit the doctrine in such a fashion, adopting rather the thought that "the dispositive consideration" is where trial will "best serve the convenience of the parties and the ends of justice."[22] Upon this consideration, the court dismissed the suit upon the condition that defendant enter a general appearance in a timely action in Puerto Rico, waiving any limitation defenses and reimbursing plaintiffs for their out-of-pocket costs and counsel fees involved in commencing action in New Jersey.

On appeal, the New Jersey Supreme Court unanimously affirmed that opinion, 25 N.J. 293, 135 A. 2d 857, and this Court denied certiorari to the contention that a State court lacked power to enter a *forum non conveniens* dismissal of a federally created cause of action (the Jones Act) brought in the only jurisdiction where *in personam* service of process could originally have been obtained, 355 U.S. 958 (1958).[23]

It is of more than passing interest that the statutory criteria for transfer prescribed by Section 1404(a) is pitched upon the same "dispositive consideration" noted in the Vargas case: the convenience of the parties and witnesses and the interest of justice. Since Congress impressed on Section 1404(a) the same indicia of discretion as formulated and used by *forum non conveniens* courts (which use conditional dismissals to route cases to forums where plaintiff

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[21] 131 A. 2d at p. 40.

[22] 131 A. 2d at p. 43.

[23] Petition for Certiorari, *Vargas* v. *A. H. Bull Steamship Co.*, No. 773, 1957 Term, p. 3 *et seq.*

was not free to maintain his action in the first instance), it seems unlikely that Congress meant for the transferring court's choice of forums to be less flexible than the choice available under the *forum non conveniens* antecedent of that provision.[24]

The background of Section 1404(a), in other words, comports with Petitioner's construction of it: that if, at the time transfer is considered the more convenient forum is available, the section's remedial provision should be capable of utilization. Certainly, if considerations of convenience and justice are better served by the use of another forum offered and made available by defendant, plaintiff should have no standing to object.[25] Such an offer "will not give the defendants a right to choose their forum, a privilege heretofore exercised at least to some degree by plaintiffs. On the contrary [such an offer] puts in the hands of an impartial federal tribunal the determination as to where the suits can best be tried."[26]

In short, there is nothing in the text or background of the statute which directs that the time when an action "might have been brought" must be determined by reference to prelitigation conditions. To the contrary, both text and background support Petitioner's construction of Section 1404(a), as does the remedial purpose of that section.

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[24] Had plaintiffs filed suit in the Illinois state courts (see n. p. 4), it is quite possible that Illinois, through its *forum non conveniens* doctrine, would have routed the litigation in the interest of justice to Utah via a conditional dismissal and thus accomplish that which the Seventh Circuit, in this diversity case, has forbidden of Petitioner.

[25] See Note, 60 Yale L. J. 183, 185 (1951).

[26] *Paramount Pictures* v. *Rodney*, 186 F. 2d 111, 116 (3rd Cir. 1950).

II.

PETITIONER'S CONSTRUCTION GIVES FULL EFFECT TO THE BROAD REMEDIAL PURPOSE OF SECTION 1404(a)

A. Section 1404(a) Is A Remedial Statute That Should Not Be Interpreted Or Applied In A Narrow Or Grudging Manner.

It is axiomatic that remedial legislation must be given a liberal construction, and "must not be interpreted or applied in a narrow, grudging manner." *Tennessee Coal Co.* v. *Muscoda Local*, 321 U.S. 590, 597 (1944); *Black* v. *Magnolia Liquor Co.*, 355 U.S. 24, 26 (1957); *Heitler* v. *United States*, 260 U.S. 438, 440 (1923); *Guardian Trust Co.* v. *Fisher*, 200 U.S. 57, 69, 70 (1906).

Section 1404(a) is unquestionably a remedial statute. It has repeatedly been so recognized and applied. "Clearly," this Court declared in one leading case, "§ 1404(a) is a remedial provision . . ." *Ex parte Collett*, 337 U.S. 55, 71 (1949).

The liberal construction appropriate for remedial enactments has been specifically applied to Section 1404(a), *first*, in holding the section applicable retroactively to actions pending at the time of its enactment, *Ex parte Collett*, 337 U.S. 55 (1949); *second*, in holding the section applicable to actions governed by special venue statutes, such as actions under the Antitrust and Federal Employers Liability Acts, *United States* v. *National City Lines*, 337 U.S. 78 (1949); *Ex parte Collett*, 337 U.S. 55 (1949); and *third*, in holding that the section "intended to permit courts to grant transfers upon a lesser showing of inconvenience" than the antecedent doctrine of *forum non conveniens*, *Norwood* v. *Kirkpatrick*, 349 U.S. 29, 32 (1955). In the last-cited case this Court quoted with approval a statement by Chief Judge John Parker, Judicial Consultant

to the Advisory Committee and one of the principal authorities on the Judicial Code, who declared: "It is perfectly clear that the purpose of this section of the Revised Judicial Code was *to grant broadly the power of transfer* for the convenience of parties and witnesses, in the interest of justice . . ."[27] (emphasis supplied)

B. Unless The Transfer Power Is Determined From Circumstances Existing At The Time Of Transfer, The Utility Of This Remedial Provision Will Be Severely Curtailed.

The Seventh Circuit's holding that the power of transfer under Section 1404(a) is to be determined by circumstances existing at the time the action is commenced severely curtails the utility of this remedial provision. In fact, the applicable venue statutes governing a majority of the civil suits filed in federal courts are sufficiently restrictive that unless the transfer power is determined with respect to events prevailing at the time of transfer there will be large numbers of cases where the district court is without power to transfer to the district or division where, "for the convenience of parties and witnesses, in the interest of justice," the action ought to be tried.

Diversity of citizenship cases, which comprise a majority of the civil actions filed in the federal courts,[28] furnish an outstanding example of the need for the hospitable construction of Section 1404(a) for which Petitioner contends. The proper venue in diversity actions is the district "where all plaintiffs or all defendants reside." 28 U.S.C. § 1391(a).

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[27] *Jiffy Lubricator Co.* v. *Stewart-Warner Corp.*, 177 F. 2d 360, 362 (4th Cir. 1949), cert. denied, 338 U.S. 947 (1950).

[28] In fiscal 1958 diversity cases accounted for more than 56% of the 45,675 private civil cases commenced in the United States district courts. Annual Report of the Director of the Administrative Office of the United States Courts, 1958, p. 162-63 (henceforth cited "Report of the Administrative Office, 1958").

If the decision below is to prevail, this venue statute would effectively confine the power of transfer in a case involving an individual or a small corporation[29] to one other forum at most. An action could be transferred from the district where all plaintiffs resided to the district where all defendants resided, or *vice versa*. Where all the plaintiffs or all the defendants did not reside in a single district, so that there was only one district where the action could have been commenced, no transfer could be had. Similarly, there could be no transfer if any defendant was not subject to service of process in the plaintiff's state of residence (so that defendant's district was the only feasible venue).

The instances cited above are more than hypothetical forecasts. They would, if the court below be right, represent serious inroads on the broad power of transfer Congress established "for the convenience of parties and witnesses, in the interest of justice. . . ."

This is illustrated by the fact that a relatively high proportion of diversity cases require a transfer to another district. Of the 4,757 contested diversity cases[30] disposed of in fiscal 1958, over 5% (241 in number) were cases in which the interest of justice and the convenience of parties and witnesses required and the judge ordered a transfer.[31] The type of circumstances involved may be illustrated by an example. Over 73% of the transfers mentioned above (177 in number) involved personal injury tort actions.[32] In such cases the situs of injury (the jurisdiction where the wit-

[29] By this is meant a corporation that is incorporated, licensed, and doing business in but a single state so that it does not have a "residence" in more than one state under 28 U.S.C. § 1391(c).

[30] Excludes cases disposed of by consent dismissals or judgments, by default judgments, or by dismissals for want of prosecution.

[31] Report of the Administrative Office, 1958, p. 170.

[32] Id., at 171.

nesses ordinarily reside and whose substantive law ordinarily prevails) frequently is not the jurisdiction where all the plaintiffs or all the defendants reside. E.g., *General Casualty Co.* v. *Keller*, 154 F.Supp. 451 (E.D. Wis. 1957) (transfer granted), mandamus denied, *General Casualty Co.* v. *Grubb*, 253 F.2d 51 (7th Cir. 1958), cert. denied, 357 U.S. 907 (1958). Unless Section 1404(a) permits transfer to a district where venue is perfected by some event fulfilled by the time the transfer is sought (such as defendant's express waiver), the district judge in such diversity cases will be powerless to transfer to the district where the trial can most conveniently and fairly be held.

The stultifying effect of the Seventh Circuit's construction of course is not limited to diversity cases. In the usual "federal question" case, where venue is only proper in the district "where all defendants reside," 28 U.S.C. § 1391(b), there could be no Section 1404(a) transfer where any defendant was an individual or a company incorporated, licensed, and doing business in a single state, since venue in the first instance would only be proper in a single forum. Similarly, if such a defendant were sued in a patent infringement case (venue under 28 U.S.C. § 1400(b)), a Section 1404(a) transfer could only be had if the defendant resided in a different district than that in which he had committed acts of infringement and had a regular and established place of business.

Other examples could, but need not, be recounted. It is obvious that the Seventh Circuit's interpretation severely limits or altogether eliminates the remedy of transfer in a great number of cases where it is appropriate and where it is even now, at least in the four Circuits sustaining the transfer power in circumstances like the instant case, being exercised. In contrast if, as Petitioner contends, the power

of transfer is determined from circumstances existing at the time of transfer the full remedial effect of that provision may be realized.

C. Unless The Transfer Power Is Determined From Circumstances Existing At The Time Of Transfer, A Court Applying This Remedial Provision Will Be Restricted To A Narrower Choice Of Transferee Forums Than It Enjoyed In Dismissing Under The Antecedent Doctrine Of Forum Non Conveniens.

Petitioner has already noted how the Reviser's Notes declare that Section 1404(a) "was drafted in accordance with the doctrine of *forum non conveniens* . . ." [33] It has been pointed out how, under that doctrine, the existence of the alternate "convenient" forum was determined as of the time of dismissal, with dismissals frequently being conditioned on the defendant's appearing and waiving defenses in the selected forum. Thus, under the doctrine of *forum non conveniens* the court enjoyed a relatively broad choice of forums in whose favor the action could be dismissed and to which the parties could be remitted in the interest of justice.

Considering the broad remedial purpose of Section 1404(a), it is highly unlikely that it was meant to reduce this broad choice. On the contrary, whenever this court has had occasion to rule on the matter it has held that Section 1404(a) was a procedural innovation more liberal than its forerunner. So, as noted above, the transfer power applies to FELA and Antitrust cases, to which *forum non conveniens* was inapplicable.[34] Likewise, as compared with

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[33] Reviser's Notes following 28 U.S.C. § 1404.

[34] *Ex parte Collett*, 337 U.S. 55 (1949); *United States* v. *National City Lines*, 337 U.S. 78 (1949). Compare *Baltimore & Ohio R. Co.* v. *Kepner*, 314 U.S. 44 (1944); *United States* v. *National City Lines*, 334 U.S. 573 (1948).

forum non conveniens, Section 1404(a) "intended to permit courts to grant transfers upon a lesser showing of inconvenience," [35] because of the enlarged remedy of transfer in lieu of dismissal. In view of the remedial purpose of this statute, its increased applicability, enlarged remedy, and less stringent standards for the exercise of discretion as compared with the antecedent doctrine of *forum non conveniens*, Petitioner can only conclude that Congress at least meant to preserve the choice of forums available under that doctrine. That can only be accomplished by the construction Petitioner advocates, determining the transfer power according to circumstances prevailing at the time of transfer. In that manner the flexibility and utility of the antecedent doctrine may be retained.

D. Petitioner's Remedial Interpretation Of Section 1404(a) Is That Adopted By An Overwhelming Majority Of Courts Of Appeals That Have Considered The Matter.

An overwhelming majority of Courts of Appeal that have considered the matter have sustained the power of transfer on the basis of the circumstances prevailing at the time transfer is ordered.[36] Their decisions are:

1. **First Circuit** (unanimous decision). *In re Josephson*, 218 F. 2d 174 (1954).

2. **Second Circuit** (unanimous decisions). *Anthony* v. *Kaufman*, 193 F. 2d 85 (1951), cert. denied, 342 U. S. 955 (1952); *Torres* v. *Walsh*, 221 F. 2d 319 (1955), cert. denied, 350 U. S. 836 (1955).

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[35] *Norwood* v. *Kirkpatrick*, 349 U.S. 29, 32 (1955).

[36] Apparently the only Court of Appeals to the contrary is the Seventh Circuit in the instant case and its companion case, *Blaski* v. *Hoffman*, 260 F. 2d 317 (7th Cir. 1958), cert. granted, No. 25, 1958 Term.

3. **Third Circuit** (5-2 decision). *Paramount Pictures* v. *Rodney*, 186 F. 2d 111 (1950), cert. denied, 340 U. S. 953 (1951).

4. **Fifth Circuit** (unanimous decision). *Ex parte Blaski*, 245 F. 2d 737 (1957), cert. denied, 355 U. S. 872 (1957).

5. **Seventh Circuit** (unanimous decision). *General Casualty Co.* v. *Grubb*, 253 F. 2d 51 (1958), cert. denied, 357 U. S. 907 (1958).

In so ruling these Courts have specifically relied on the remedial purpose of Section 1404(a). For example in *Ex parte Blaski*, 245 F. 2d 737, 738, (5th Cir. 1957), cert. denied 355 U. S. 872, the Fifth Circuit observed:

> ". . . The purposes for which § 1404(a) was enacted would be unduly circumscribed if a transfer could not be made in the 'interest of justice' to a district where the defendants not only waive venue but to which they seek the transfer."

To the same effect was Chief Judge Magruder's reasoning in *In re Josephson*, 218 F. 2d 174, 184 (1st Cir. 1954):

> ". . . Reading § 1404(a) in the light of this settled doctrine [that venue requirements might be waived], it seems to us altogether proper to hold that a case may be transferred to a district not having statutory venue provided the defendant or defendants for whose benefit the venue privilege is conferred agree to waive the same. *Such an interpretation indeed is to be favored, since it tends to enhance the usefulness of this important provision for administrative transfer of cases in the interest of convenience and justice.*" (emphasis supplied)

CONCLUSION

Accordingly, Petitioner's construction is not only supported by the express language of the statute, reinforced by its remedial purpose and the antecedent doctrine of *forum non conveniens*, but it also enjoys the weight of authority.

For the reasons set forth, Petitioner believes that the Court of Appeals for the Seventh Circuit erroneously construed the extent of the authority accorded to Petitioner under 28 U.S.C. § 1404(a) and improperly issued its writ of mandamus directed to him. Petitioner respectfully suggests that this action by the Seventh Circuit should be set aside.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 26

HONORABLE PHILIP L. SULLIVAN, CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS,

Petitioner,

vs.

OTTO BEHIMER AND JOHN A. ROBERTS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENTS.

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BRIEF FOR RESPONDENTS.

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

QUESTIONS PRESENTED.

The "Question Presented", as stated in the Brief for Petitioner oversimplifies the issues in this cause and ignores certain of the contentions made by Respondents in the District Court and in the Court of Appeals.

It is respectfully submitted that the "Questions Presented" are as follows:

(1) Whether a District Court, having proper venue and jurisdiction over Defendants is a minority stock-

holders' suit, has the power under Section 1404(a), Title 28, USCA to transfer the cause on motion of the Defendants to a district where suit could not originally have been brought by the Respondents?

(2) If such power does exist, was the power exercised prematurely?

(3) Did the Respondent properly exercise his discretion?

DECISION BELOW.

The United States Court of Appeals for the Seventh Circuit in this case (R. 91-94) and in the case of *Blaski* v. *Hoffman*; now before this Court *sub nomine Hoffman* v. *Blaski*, No. 25, answered the first Question Presented in the negative. The Court of Appeals found it unnecessary to decide whether the exercise of discretion was proper (R. 93).

THE STATUTORY SECTION UNDER WHICH TRANSFER OF THIS CASE WAS SOUGHT.

Section 1404(a), Title 28 USC, is the statutory section under which transfer was sought in this case. It provides as follows:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division *where it might have been brought.*"*

---

* Emphasis added throughout this brief unless otherwise indicated.

STATEMENT OF THE CASE.

These facts must be added to Petitioner's Statement of the Case: The Record discloses the following material pleadings:

(1) The Defendants in the District Court, Standard Oil Company and Standard Oil Foundation, Inc., each filed Motions to Dismiss (R. 23, 54); these Motions to Dismiss were not decided prior to the Order of Transfer.

(2) The Affidavit in Support of the Motion for Transfer (R. 65-75) does not disclose the name of a single witness who would testify for Defendants or the location of a single document that would be presented in evidence.

SUMMARY OF ARGUMENT.

I. Respondents contend that the trial judge does not have the power to transfer a civil action to another district if the transferee district is not one where the action could have *originally* been brought. The consent of the Defendant to appear in the transferee district does not bring that district within the purview of the statute.

II. Until the preliminary motions are disposed of and clear cut issues of fact are joined, it is impossible for the district judge to determine where the balance of convenience of parties and witnesses may lie.

III. The party seeking the transfer must show by a clear preponderance that Respondents' choice of forum should be disturbed. The Defendants have not satisfied this burden of proof.

ARGUMENT.

I.

A. THE ESTABLISHED RULES OF STATUTORY CONSTRUCTION DO NOT EMPOWER A TRANSFER TO THE DISTRICT COURT OF UTAH.

Respondents, in their Affidavit and Brief in the District allege (without denial by Defendants) that statutory venue does not exist in the transferee district (R. 76, 92).

Wherever possible, every word and clause of a statute must be given its full force and effect. The rule is clearly stated in Sutherland, *Statutes and Statutory Construction*, 3d Ed. Vol. 2, p. 339:

> "'It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute' (citing cases). A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, . . ."

That is in accordance with the law as laid down by this Court in the case of *United States of America* v. *Menasche*, 348 U.S. 528, 538, 539, wherein this Court stated as follows at pages 538 and 539:

> "It is our duty 'to give effect, if possible, to every clause and word of a statute,' *Montclaire* v. *Ramsdell*, 107 U.S. 147, 152, 27 L.Ed. 431, 433, 2 S.Ct. 391; rather than to emasculate an entire section, as the government interpretation requires."

B. THE GRAMMATICAL ANALYSIS OF SECTION 1404(a) SUPPORTS THIS CONSTRUCTION.

Petitioner contends that the grammatical interpretation of the tense implies "might have been brought" refers

to the time of the transfer. He states in his Brief that the tense is in the pluperfect. The Oxford Universal Dictionary defines pluperfect as

> "Applied to that tense of the verb which expresses a time or action completed prior to some past point of time, specific or implied."

The point of time refers to one in the past, the time at which the suit was instituted. Section 1404(a) contains two verbs, "may transfer" and "might have been brought". The first verb is in the present tense, giving the District Court a present power; the second verb is in the pluperfect, otherwise known as past perfect, referring to a point of time in the past.

If the Congress intended to refer to the jurisdiction at the time of the transfer, the statute would have read "where it may be brought", using the present tense of "may" in both clauses of the sentence. The Congress saw fit to use the pluperfect, and refer the venue to a point of time in the past—a point of time prior to the transfer, not simultaneous with it.

C. TWO OR MORE FORUMS WERE CONTEMPLATED BY THE CONGRESS AT THE TIME SECTION 1404(a) WAS ENACTED.

Petitioner seeks not only to distort the clear wording of a statute, but to thwart the intent of the Congress, as well. H. R. Rep. No. 2646, 79th Cong. 2d Sess. (1946), p. A127, and H. R. Rep. No. 308, 80th Cong. 1st Sess. (1947), p. A132, state the purposes for the enactment of Section 1404(a), to remedy a situation presented in *Baltimore & Ohio R. Co.* v. *Kepner*, 315 U.S. 44 (1941), "which was prosecuted under the Federal Employer's Liability Act in New York, although the accident occurred

in Ohio. The new subsection requires the court to determine the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so." An examination of that decision, which the Congress felt was inequitable and should be the subject of remedial legislation, discloses that under Section 6 the Federal Employer's Liability Act (45 U.S.C. 56) an action may be brought in the district where the defendant resides, or where the cause of action arose. The accident occurred in Butler County, Ohio, adjacent to Hamilton County, wherein the employee resided, and defendant's railroad ran through both counties. The suit could have been brought in the district in which either Hamilton or Butler County lay, but the employee chose to file suit in the District Court for the Eastern District of New York.

Of the many cases of *forum non conveniens* that had been reported prior to 1946, the House Reports mention only one case, a 1941 case *where there was more than one forum open to the plaintiff*. The enactment of Section 1404(a) was intended to permit transfer of causes in that instance and only in that instance. If the intent of Congress had been otherwise, the House Reports would have pointed out different cases to illustrate the hardship they intended to remedy.

If the Congress had intended to give the district court the power to transfer a cause to *any* district, for the convenience of witnesses and in the interest of justice, without limitation, as contended by Petitioner, they would not have added the words of limitation, "where it might have been brought". But those words were added, this limitation must be observed, and the intent of the Congress must be honored.

D. RESPONDENTS' INTERPRETATION OF SECTION 1404(a) HAS BEEN ADOPTED BY OVERWHELMING MAJORITY OF DECISIONS.

An examination of the facts in reported cases where the doctrine of *forum non conveniens* has been applied discloses that in almost all cases there was more than one forum open to the plaintiff at the time the original suit was filed. Some of these decisions are:

1. *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501 (1947), 503. The opinion clearly states that plaintiff lived and defendant did business in Virginia, "where all events in litigation took place, where most of the witnesses reside, and where both state and federal courts are available to plaintiff and are able to obtain jurisdiction of the defendant".

2. *In re Josephson,* C.A.-1 (1954) 218 F. 2d 174, 183. "jurisdiction of the subject matter, and proper venue, exist both in the Federal Court for the District of Massachusetts and in the Federal Court for the District of New Mexico".

3. In *Anthony* v. *Kaufman,* C.A.-2 (1951), 193 F. 2d 85, the Court points out that one defendant could have been served in the transferee district.

4. In *Torres* v. *Walsh,* C.A.-2 (1955), 221 F. 2d 319, 321 (consolidated cases), a libel could have been brought in the transferee district in one case and the Pennsylvania Railroad could have been sued in Pennsylvania, the transferee district in the other case.

5. In *Paramount Pictures* v. *Rodney,* C.A.-3 (1951), 186 F. 2d 111, 114, "Suits embracing the identical subject matter could have been brought and, literally 'might have been brought', by the plaintiffs against the defendants in any district court in Texas".

II.

A. THE ORDER FOR TRANSFER WAS PREMATURE FOR THE REASON THAT ISSUES OF FACT HAD NOT YET BEEN JOINED AT THE TIME THE ORDER WAS ENTERED.

The Defendants each filed its "Answers and Motions to Dismiss" (R. 23, 53) and as grounds for dismissal claim, *inter alia*, that neither the partially owned and dissolved Utah subsidiary nor the newly created wholly owned Utah subsidiary were made parties defendant, and that they were indispensable parties; that the plaintiffs do not allege facts disclosing their right to bring a derivative suit, and that there is no common question of fact or law affecting the several rights of plaintiffs and of persons alleged to be similarly situated to plaintiffs.

It is submitted that until the preliminary motions are disposed of and issues of fact joined, it is impossible for the District Court to determine what witnesses or documentary evidence are important, the relative convenience or inconvenience of the forum, or whether, indeed, any testimony or evidence will ever be presented to this Court or any other Court. In *Webster-Chicago Corp.* v. *Minneapolis-Honeywell Regulator Co.*, D.C. Del. (1951), 99 F. Supp. 503, 506, the Court stated:

> "Assuming, then, that in this case the existence of a justiciable controversy will be denied by the defendant, then this issue must be first determined, for upon this the jurisdiction depends.
>
> "At the present stage of this case, however, it is not clear that the existence of a justiciable controversy may not be raised by motion as suggested by the defendant. For the determination of such motion witnesses may not be essential nor their convenience considered. If the existence of a justiciable contro-

versy becomes a factual issue determinable in some manner by affidavits, deposition or actual witnesses, then the necessity of such witnesses, their number and convenience may be considered in any subsequent proceedings."

One of the principal grounds relied upon for transfer is that "The majority of the class purported to be represented by plaintiff in this suit, both in number of holders and in number of shares held, reside in Utah or contiguous States" (R. 62-63); yet in their Motions to Dismiss Defendants state Plaintiffs are not representative of the class. These two contentions are mutually exclusive and that issue should have been decided before the Order of Transfer was entered.

If either of the Utah corporations is an indispensable party and they cannot be brought before the Illinois Court, this case may be disposed of without trial.

All preliminary motions should have been determined and issue joined before the Court should have entertained or determined the Motions for Transfer.

B. DIFFERENT ISSUES WOULD BE PRESENTED IF THE PLAINTIFFS SUE AS REPRESENTATIVES OF A CLASS RATHER THAN ON THEIR OWN BEHALF, ONLY, AND THIS SHOULD HAVE BEEN DETERMINED PRIOR TO THE ORDER OF TRANSFER.

The right of plaintiffs to recover damages if it can be shown that UTOCO, the partially owned subsidiary, was sold for less than its going concern value cannot be denied. The Motions to Dismiss do not include this as a ground for dismissal. In a similar case, *Lebold* v. *Inland Steel Co.*, C.A.-7 (1942), 125 F. 2d 369, 375, the Court said:

"The damages to be allowed are the difference between what plaintiffs have received from the sale of the physical assets and what the stock was really worth as stock in a going prosperous concern continuing business."

If Plaintiffs are not permitted to maintain their action as a derivative suit, they can surely proceed on behalf of themselves, as stockholders. But then the relative conveniences change: the suit is against the majority stockholders, Standard Oil Company and Standard Oil Foundation, Inc., for their allegedly oppressive action as majority stockholders. Their offices are in Chicago. The residence of the other stockholders becomes immaterial, whether such other stockholders are those Plaintiffs claim to represent or whether such other stockholders are those Plaintiffs claim were under the domination and control of the Defendants. Those stockholders would have no interest in the suit, as represented parties plaintiff, co-conspirators with the Defendants, or as witnesses.

If Plaintiffs are permitted to maintain this action solely on behalf of themselves, the considerations of conveniences change. *Koster v. Lumbermens Mutual Casualty Co.*, 330 U.S. 518 (1946). This was a stockholder's derivative action and this Court recognized differences in the considerations of convenience. At page 524 the Court states:

"Where there are only two parties to a dispute, there is a good reason why it should be tried in the plaintiff's home forum if that has been his choice. He should not be deprived of the presumed advantage of his home jurisdiction except upon a clear showing of facts which either (1) establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience, or

(2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems. In any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown."

The Court then distinguishes this situation from a derivative action:

"But where there are hundreds of potential plaintiffs, all equally entitled voluntarily to invest themselves with the corporation's cause of action and all of whom could with equal show of right go into their many home courts, the claim of any one plaintiff that a forum is appropriate merely because it is his home forum is considerably weakened."

Petitioner did not see fit to give any grounds for the Order for Transfer, there being no written decision or statement from the bench giving such grounds. His reasoning was not given until his Answer to the Petition for Writ of Mandamus before the Court of Appeals (R. 83-90). This Answer (prepared by Attorneys for Defendants) relies on the Brown affidavit and stresses the residences of the class for whom Respondents assume to act and the residences of the "controlled stockholders" (R. 88). He states that there will be "issues as to dominance and control". He has entirely ignored the possibility that this will not be a class action, but solely a suit between Plaintiffs and the majority stockholders; in which case there is no issue of dominance or control, no other stockholders are involved, and the weights and considerations of convenience and inconvenience change.

III.

THE PARTY SEEKING THE TRANSFER FAILED TO FULFILL THE BURDEN PLACED UPON THEM TO OVERCOME RESPONDENTS' CHOICE OF FORUM.

An examination of the Affidavit of Grant A. Brown in support of the Joint Motions for Transfer (R. 65-75) fails to disclose the name of a single witness who will be called to testify upon trials and fails to disclose the nature or location of a single document that Defendants plan to introduce in evidence. The record shows the executive offices of Standard Oil Company to be at 910 South Michigan Avenue, Chicago, Illinois (R. 49). The certification of the financial statements of Standard Oil Company and Utah Oil Refining Co. by Price, Waterhouse & Co. was issued at Chicago (R. 42).

It is clear that the burden of proving convenience or inconvenience is upon the party seeking the transfer. *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501, 508:

> "But unless the balance is strongly in favor of the defendant, the plaintiffs' choice of forum should *rarely* be disturbed."

In *Ford Motor Co.* v. *Ryan,* C.A.-2 (1950), 182 F. 2d 328, 330, the Court of Appeals interpreted the quotation from *Gulf Oil Corp.* v. *Gilbert, supra*:

> "Those words we interpret to mean (a) that a defendant has the burden of making out a *strong case* for a transfer and (b) that the plaintiffs' privilege, conferred by statute, of choosing the forum he selected is a factor to be considered as against the 'convenience' as between 'the parties.'"

In separate concurring opinion by L. Hand, Chief Judge, at 332:

> "I wish to put my vote solely upon the ground that Sec. 15 of Title 15 U.S.C.A. gives to a plaintiff a privilege which a defendant must overcome by *more than a barç balance* of convenience *between the two forums* . . . a defendant must do more than show that the transfer will on the whole make the trial more convenient; *it must make the trial markedly more convenient.*"

See also *McKinney* v. *Southern Pacific Company*, D.C. Texas (1957), 147 F. Supp. 954; *National Tea Company* v. *Marseille*, D.C. N.Y. (1956), 142 F. Supp. 415; *Marks* v. *Fireman's Fund Ins. Co.*, D.C. N.Y. (1953), 109 F. Supp. 800.

This Court can take judicial knowledge of the enormous wealth of Standard Oil Company. It is not contended that the Respondents are impecunious. However, their relative means should have been considered by the trial judge. The court should "consider the ability of defendant . . . to transport their witnesses to the place of trial". 10 F.R.D. 596, 606.

The multi-state corporation should not be permitted to use its tentacles to require an individual, seeking redress for fraud, to seek to enforce his rights a thousand miles or more from the forum of his choice. The free and excessive use of the discretion granted in Section 1404(a) will not be in the interests of justice, and such discretion be used sparingly and in the rare case. These are the thoughts of Justice Black in his dissenting opinion in the *Gulf Oil* case:

> "For any individual or corporate defendant who does part of his business in states other than the one in which he is sued will almost invariably be put to some inconvenience to defend himself. It will be a poorly represented multi-state defendant who

cannot produce substantial evidence and good reasons fitting the rule now adopted by this Court tending to establish that the forum of the action against him is most inconvenient. The Court's new rule will thus clutter the very threshold of the federal courts with a preliminary trial of fact concerning the relative convenience of forums. The preliminary disposition of this factual question will, I believe, produce the very kind of uncertainty, confusion, and hardship which stalled and handicapped persons seeking compensation. . . . The broad and indefinite discretion left to federal courts to decide the question of convenience from the welter of factors which are relevant to such a judgment, will inevitably produce a complex of close and indistinguishable decisions from which accurate prediction of the proper forum will become difficult, if not impossible."

If litigants are permitted to clutter the record with long, vague affidavits, containing only generalizations, without a specific showing of the names and addresses of *key witnesses*, the trial judge will not be able properly to exercise the discretion granted him in Section 1404(a). The Defendants' Affidavit does not permit the Petitioner to make a rational determination of the relative conveniences of the forums involved. See *Ultra Sucro Co.* v. *Illinois Water Treatment Co.*, D.C. N.Y. (1956), 146 F. Supp. 393, 398:

"A third important consideration is the convenience of third party witnesses. Since parties tend to outdo each other in the sum total of possible witnesses they can locate in or near the district in which each would like to try the case, the judge must endeavor to determine who the *key witnesses* are rather than merely count up the possible witnesses for each side."

See also the article of Judge Irving R. Kaufman, 10 F.R.D. 595, 606:

> "A most important criterion, but one which has not appeared too often in cases is the ability of the parties to bear the expenses of trial in the transferee forum. Thus one court has said that a transfer to a forum out of reach of an impecunious plaintiff cannot be in the 'interests of justice' and it is undoubtedly this feeling which has led courts to consider the ability of the defendant railroads to transport their witnesses to the place of trial."

The uncontroverted Affidavit in opposition of the Motions for Transfer (R. 76-79) states that the principal place of business of Standard Oil Company to be in Chicago, with its own Standard Oil Building, executive and administrative offices and law department; that the decision as to the amount to be paid for UTOCO's assets must have been made by Standard Oil's executives in Chicago; that the physical description of UTOCO's properties and operations, appraisals of physical properties and oil and gas reserves and correspondence existed in the Chicago office.

Because the value of UTOCO's assets, as well as its value as a going concern, are the gist of Plaintiffs' case, it is apparent that expert testimony would be needed in order for the Court to determine these values. The Affidavit (R. 79) states that the testimony of engineers, business analysts and professional appraisers would be presented. These expert witnesses are far more available in a metropolis like Chicago than they would be in Salt Lake City, Utah.

The Petitioner states that the Affidavit in Opposition does not controvert the Affidavit in Support of the Motions for Transfer (R. 85). He fails to state that the

contrary is just as true: not one allegation in the Affidavit in Opposition is denied by the defendants. Yet Petitioner accepted the Affidavit in Support fully and completely. It is interesting to note that the *only* mention of the Affidavit in Opposition is to state that it does not controvert the other Affidavit.

There is a burden of proof on the party seeking the transfer. Perhaps there are different burdens in the transfer of a class action as compared with the burden when there are only two parties.

Petitioner has made unwarranted assumptions in his Answer, wherein he attempts, in retrospect, to justify the Order for Transfer: the business of the purchasing corporation would be "disrupted by the absence of its officers and directors to attend pre-trial and trial proceedings of this suit in Chicago" (R. 89). The assumption goes farther than the Affidavit in Support, which does not state that the officers and directors will ever be witnesses.

Petitioner attempts to justify the Order for Transfer by referring to the difficulty and problems of conflict of laws because the substantive law would be that of Utah. To this rationalization see *Lewald* v. *York Corporation*, D.C. N.Y. (1946), 68 F. Supp. 386, 388, where the Court paraphrases *Williams* v. *Green Bay & Western Railroad Co.*, 326 U.S. 549, as holding:

> "In hornbook fashion we may isolate the court's proposition thus: The following do not want a district court's declination of jurisdiction:
>
> (1) The mere fact that the case involves the internal affairs of a foreign corporation.
>
> (2) The fact that the case is governed by the corporation law of a state other than the one in which the district court sits.

(3) The difficulty of deciding the corporation law of a foreign state.

(4) The fact, alone, that the claim involves complicated affairs of a foreign corporation."

Respondents contend that the Order for Transfer was entirely unwarranted, not for the convenience of the parties or the witnesses, not in the interests of justice, and constitute an abuse of the discretion vested in Petitioner under Section 1404(a).

CONCLUSION.

For the reasons set forth, Respondents contend that the Court of Appeals for the Seventh Circuit correctly construed Petitioner's authority under Section 1404(a). In view of the premature decision and abuse of discretion by the Petitioner (which the Court of Appeals found unnecessary to decide) Respondents respectfully urge that the decision should be affirmed.

Respectfully submitted,

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This reply is addressed to two aspects of the brief for respondent. The first concerns respondents' arguments which are addressed to the question presented and accepted for review by this Court. It is hoped that a brief comment upon these arguments will be helpful to the Court. The second concerns respondents' attempt to raise contentions which are extraneous to the review authorized by this Court, which were not considered by the Court of Appeals below, and which Petitioner feels are demonstrably frivolous.

I.

As To The Question Presented

A. Respondents advance the rule that statutes should be so construed as to give effect to every clause and sentence. But this cannot advance respondents' argument, failing as it does to show wherein Petitioner's construction of § 1404(a) violates this rule in any respect.

In short, Petitioner agreed that the concluding clause "where it might have been brought" acts as a limitation upon the power of District Courts to transfer civil actions under § 1404(a) (Pet. Br. p. 8). Petitioner's construction gives full effect to this limitation by forbidding transfer of civil actions to forums which, irrespective of the consent of the parties, do not possess jurisdiction to hear and determine (Pet. Br. pp. 14-17).

B. Respondents argue that, grammatically, § 1404(a)'s concluding clause refers to "a point in time in the past—a point of time prior to the transfer, not simultaneous with it" (Resp. Br. p. 6).

Petitioner does not disagree. However, the point in time at which the action "might have been brought" in the transferee forum is not grammatically required or implied to be prior to the time the action was initially commenced, as respondents argue. Grammatically speaking, the point in time at which the transfer power is determined may properly be any time prior to the exercise of such power (e.g., when the motion to transfer is presented). Such an interpretation is not only consistent with the grammatical reading of the statute (Pet. Br. pp. 11-13) but also comports with the sense of the statute in that it measures the existence of the transfer power and the need for its exercise in the light of contemporaneous factors, rather than those existing prior to the suit.

Were the statute to be read as respondents urge—that is, that the availability of a transferee forum should be determined on the basis of pre-suit conditions—subsequent changes in the residences of the parties would presumably be immaterial. A diversity plaintiff who changed residence during the course of the lawsuit, for example, would be unable to request the transfer of his action to his new residence, since venue there was originally improper. Likewise, if respondents' argument be correct, the transfer of an action to a forum originally but not contemporaneously possessed of subject matter jurisdiction would presumably be authorized, despite the withdrawal of such jurisdiction as illustrated by the Congressional amendment to 28 U.S.C. § 1332, Public Law 85-554.[1]

C. Petitioner disputes respondents' assertion that § 1404(a) was enacted simply "to remedy a situation presented in *Baltimore & Ohio R. Co.* v. *Kepner*, 314 U.S. 44 (1941)" (Resp. Br. p. 6). The House Reports cited by respondents (which reports simply reproduce the Reviser's Notes) set forth the Kepner case as "*an example* of the need of such a provision . . ." (emphasis supplied). This interest in *Kepner*, however, was due only to its restriction upon the full play of *forum non conveniens*. *Ex parte Collett*, 337 U.S. 55, 69, 71 (1949). The fact that more than one forum happened to be open to plaintiff in the *Kepner* case was not mentioned either in the House Reports or the Reviser's Notes, and consequently that fact cannot be relied upon as indicating a limitation on the statutory transfer power.

The Reviser's Notes do say that § 1404(a) "was drafted in accordance with the doctrine of *forum non conveniens*

[1] For the purposes of diversity jurisdiction and removal, a corporation is now "deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business."

. . ." Respondents do not, however, attempt to answer Petitioner's showing that under *forum non conveniens* the instant action could have been routed to the appropriate Utah forum by the device of a conditional dismissal (Pet. Br. pp. 17-22). It would indeed be anomalous if § 1404(a), with its *forum non conveniens* antecedent, were to be construed to prohibit that which its common law predecessor authorizes: viz., the re-location of actions in the interest of justice.[2]

D. Respondents assert that in almost all reported *forum non conveniens* cases there was more than one forum open to the plaintiff, and for this respondents cite the decisions in *Josephson, Anthony, Torres,* and *Paramount Pictures*[3] (Resp. Br. p. 8). These decisions, of course, involved § 1404(a) transfers and not *forum non conveniens;* furthermore, an examination of them discloses that the alternate (transferee) forum became available to the plaintiff upon the post-suit waiver and consent of some or all of the defendants. These decisions therefore support Petitioner's construction of § 1404(a) and his transfer of the action below to the District of Utah.

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[2] If respondents' construction of § 1404(a) is correct, a diversity action with post-suit waiver of venue or personal service, filed in a federal district court sitting in New York or New Jersey, for example, could not be transferred. But the Chinese copy of such action, if filed in the State court of the district (where now under some circumstances, in view of the recent amendment to 28 U.S.C. § 1332, the action must be filed) would upon such waiver be transferable (Pet. Br. pp. 19-20). As so construed, § 1404(a) would be strangely retrogressive for a remedial statute.

[3] The full citations of these cases are: *In re Josephson,* 218 F. 2d 174 (1st Cir. 1954); *Anthony* v. *Kaufman,* 193 F. 2d 85 (2d Cir. 1951), cert. denied, 342 U.S. 955 (1952); *Torres* v. *Walsh,* 221 F. 2d 319 (2d Cir. 1955), cert. denied, 350 U.S. 836 (1955); *Paramount Pictures* v. *Rodney,* 186 F. 2d 111 (3rd Cir. 1950), cert. denied, 340 U.S. 953 (1951).

II.

As To The Extraneous Matter Now Urged

The question presented by Petitioner to this Court, and which this Court undertook to review by writ of certiorari, concerns only the question of the power of the federal district courts under § 1404(a). This question was one which at the time of its presentation respondents regarded as adequately stated and to which they offered no alternate or additional questions.[4]

Respondents now contend that this Court should review not only this statutory power but also the factual propriety of Petitioner's transfer in the instant case. Thus, respondents have it that Petitioner's transfer was both premature and an abuse of discretion, and to these contentions they devote a goodly portion of their brief.

These two contentions are frivolous for three reasons: (A) being outside the scope of the review granted herein, the issues are not before this Court; (B) not having been ruled upon by the Court of Appeals below, the issues are in any event unsuited for determination by this Court; and (C) on the merits, respondents are wrong.

A. "It is well settled," Mr. Justice Douglas declared for a unanimous Court, "that this Court confines itself to the ground upon which the writ [of certiorari] was asked or granted, the review here being no broader than that sought by petitioner." *Helis* v. *Ward*, 308 U.S. 365, 370 (1939); *Trailmobile Co.* v. *Whirls*, 331 U.S. 40, 48 (1947). Accordingly, to paraphrase Mr. Justice Jackson's remarks in

[4] Respondents, in their brief opposing certiorari, stated (p. 1) that "the question presented [is] adequately set forth in the petition."

Irvine v. *California*, respondents' smuggled contentions must be disregarded.[5]

B. The Court of Appeals below did not reach and made no ruling upon these additional contentions of respondents (R. 93). If only for this reason, these issues should not be determined by this Court. It is only in exceptional cases that this Court will rule upon issues not reached by the Court of Appeals. *Owens* v. *Union Pacific R. Co.*, 319 U.S. 715, 724-725 (1943). Since respondents have not suggested (and could not suggest) any circumstances rendering this situation exceptional, the issues are not appropriate for resolution.

C. Finally, respondents' contentions about Petitioner's prematurity and abuse of discretion are unfounded on the merits for the reasons stated by Petitioner in his Answer to the Rule to Show Cause (R. 87-90). Petitioner thinks it necessary only to add that respondents' assertion that the considerations of convenience would change were respondents to sue only on their own behalf (Resp. Br. pp. 10-12) is incorrect. The substantive allegations of the complaint as to dominance and control, which have been put in issue by the defendants' answers (R. 15, 53), would still remain to be resolved in the light of the testimony of Utah witnesses.

Wherefore, Petitioner respectfully requests that the judgment of the United States Court of Appeals for the Seventh

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[5] This Court has expressly "disapprove[d] the practice of smuggling additional questions into a case after we grant certiorari." *Irvine* v. *California*, 347 U.S. 128, 129 (1954). See also *Mazer* v. *Stein*, 347 U.S. 201, 208 n. 6 (1954).

Circuit be reversed, and that this cause be remanded for such further proceedings as may be proper.

Respectfully submitted,

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